



Office of the City Manager

SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 1

Meeting Date: June, 2, 2022

Item Number: 01

Item Description: Ashby and North Berkeley BART Station Areas: Proposed Zoning and General Plan Amendments, City and BART Joint Vision and Priorities, Associated Environmental Review Documents and City and BART Memorandum of Agreement

Submitted by: Paul Buddenhagen, Deputy City Manager

This supplemental communication provides an overview of key elements of the City and BART Memorandum of Agreement (MOA) for the North Berkeley and Ashby Transit Oriented Developments (**Attachment 1**). The City and BART MOA builds on the existing Memorandum of Understanding (MOU) executed in March 2020 and clarifies the processes that BART and/or the City will pursue moving forward to develop BART-owned property at North Berkeley BART Station, as well as a timeline for pending actions related to the Ashby BART site.¹ The City and BART anticipate amending this MOA later in 2022 to address issues specific to the Ashby BART site.² Both the City Council and the BART Board of Directors must approve the MOA(s) for them to become effective.

There are still many unknowns that will become clearer in the future, after developer teams are selected and more information is known about funding sources, prevailing economic conditions and proposed development concepts for the sites. As such, the MOA serves as the overarching document for how the City and BART will work together, as well as with the selected developer(s). The MOA outlines how the project

¹ https://www.bart.gov/sites/default/files/docs/BART-Berk%20MOU_Signed3-6-2020.pdf

² The Ashby BART site has more complex issues related to the City's option to purchase the air rights over the western parking lot, and to right-of-way and infrastructure issues that are currently being studied. These studies are looking at potential roadway reconfigurations of Adeline Street and options for the Berkeley Flea Market using space in the Adeline Street right-of-way and/or a portion of the adjacent 2180 Milvia Street, Berkeley, CA 94704 • Tel: (510) 981-7000 • TDD: (510) 981-6903 • Fax: (510) 981-7099
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negotiation and entitlement process will proceed; the objectives and minimum requirements for the project in terms of design, affordability, and infrastructure; and the anticipated City and BART contributions to the project. The MOA is intended to provide transparency and accountability for the City, BART, the community, and potential developers based on all the information currently available. The MOA also references mechanisms that the City and/or BART have to enforce requirements on future developer teams such as City-adopted Objective Design Standards, real estate agreements between developer(s) and BART and affordable housing funding regulatory agreements between the City and developer(s).

Key elements of the MOA include:

- **Timeline for Development Activities.** The City and BART have agreed on dates by which the parties will complete major tasks, such as BART initiating and completing developer selection for each station, developing and adopting Objective Design Standards, among other milestones.
- **Phasing & Funding for Affordable Housing for North Berkeley.** In April 2021, City Council approved a reservation of \$53 million in City affordable housing funds so that at least 35% of the housing units proposed at each of the stations would be restricted as affordable housing (as stated in the City and BART Joint Vision and Priorities). The MOA sets out conditions and mechanisms for eligible developer(s) selected for North Berkeley to access these affordable housing funds. The City of Berkeley would consider and approve award(s) of funding for affordable housing, which may include early (predevelopment) funding for selected nonprofit developers and subsequent approvals for development funding. These decisions would be made by City Council at a public meeting in open session.
- **Assembly Bill 2923 (AB 2923) Streamlining and Objective Design Standards.** Because of the potential for proposed development at the BART stations to be eligible for the streamlined approval process pursuant to SB 35 (if specific requirements stated in AB 2923 are met), the City and BART have agreed to the process outlined in the MOA to develop, approve and enforce Objective Design Standards (ODS). Consistent with the AB 2923 Development Principles adopted by the BART Board in August 2020, BART will help enforce the ODS through its real estate agreements under certain conditions, provided the City zones for the highest and most feasible use for the properties in June 2022.

The intent of the ODS is to allow the City and the community to have a strong voice in the design quality of the development at both stations. The process to develop ODS will include input from City and BART staff, community stakeholders, the selected developer and would need to be adopted by City Council. Main topics in the ODS may include but are not limited to:

- Station Functionality
- Public Realm Standards
- Building Form/Massing

Ashby BART station area. See 4/19/22 Council Worksession Report, p.7 for a more detailed description of these studies. City and BART staff have been engaging with the Berkeley Flea Market Board and anticipate broader community engagement in Summer 2022. City staff anticipate bringing more information back to Council on these topics in Fall 2022.

- Building Facade Design
 - Building Placement (e.g. transitions in height/scale)
 - Open Space
- **Developer Selection Process for North Berkeley.** Because the City Council has provisionally reserved City affordable housing funding for these sites, the RFQ will be combined with a City Notice of Funding Availability (NOFA) for preliminary or “predevelopment” City funding in order to better attract nonprofit developers. Developer teams may include one or more developers, plus designers and consultants. As noted in the March 2020 MOU, in recognition of the City and BART’s collaboration and the City Council’s reservation of \$53 million towards affordable housing (April 2021) at the two BART sites, and progress toward rezoning the sites in alignment with AB 2923, the MOA states that the developer evaluation committee will consist of an equal number of BART and City representatives, rather than having a majority of BART representatives as is typical. The BART Board retains the sole authority to determine whether, and with whom, BART will enter into an Exclusive Negotiation Agreement (ENA) relating to potential future TOD. Developer selection criteria will include, but not be limited to:
 - Alignment with the Joint Vision and Priorities
 - Including depth and quantity of affordable housing
 - Past experience and ability to finance and deliver projects
 - Past experience and demonstrated accountability towards equity goals in the City of Berkeley.
 - Other criteria for City affordable housing funding.

Depending on the number of developer team submissions, it may be necessary to select a “short list” of teams who would be required to participate in a town hall-style public meeting, and to interview with the City – BART selection committee.

- **Minimum Requirements for the North Berkeley Project.** The JVP establishes both minimum expectations for development as well as aspirational goals. To reinforce the significance of this document, the City and BART have established in the MOA a set of minimum requirements to which the developer must adhere, many of which are derived from the JVP and other City and BART Board-adopted requirements (e.g., project labor requirements). Minimum requirements include a project with a residential program with a minimum of 1,000 bedrooms in a variety of sizes, minimum affordability requirements, a connection to the Ohlone Greenway, among other elements. The MOA establishes mechanisms by which BART, the City, or both will reinforce these minimum requirements.
- **City and BART Areas of Cooperation.** The MOA also emphasizes the City and BART’s commitment to cooperate collaboratively throughout the development process, including proactively working with developer(s) to secure grant funding to realize desired public benefits. Another area of cooperation is working together to identify ways to address “spillover” parking impacts around the TOD at the two BART sites, including determining an on-street parking strategy by November 1, 2022.
- **Ashby BART Station Area Timeline.** Given the outstanding issues still to be addressed before the Ashby developer solicitation can be released in early

2023, the MOA lays out a timeline for their resolution in a timely manner. These outstanding issues include, but are not limited to, securing a new permanent location for the Berkeley Flea Market, the City's option to acquire air rights for the Western Parking Lot, the potential reconfiguration of Adeline Street, the design and funding of station infrastructure, and the role of BART and the City in the developer solicitation process. It is anticipated that an amendment to the MOA, as well as completion of related agreements and documentation, will be needed in order to advance solicitation of developer(s) for the Ashby BART station area.

If Council approves the MOA, the City and BART staff will finalize and execute the MOA.

Attachment(s)

1: *Draft Memorandum of Agreement with BART regarding next steps to plan for Transit Oriented Development at the Ashby and North Berkeley BART Station Areas*

- *Exhibit A: City and BART Memorandum of Understanding (March 2020).*
 - *Note: Available online at:*
https://www.bart.gov/sites/default/files/docs/BART-Berk%20MOU_Signed3-6-2020.pdf
- *Exhibit B: City and BART Joint Vision and Priorities for Transit Oriented Development at the Ashby and North Berkeley BART Station Areas*
 - *Note: Provided as Attachment 1, Exhibit D to staff report for June 2, 2022 Special Council Meeting:* <https://berkeleyca.gov/your-government/city-council/city-council-agendas/city-council-2022-06-02>
- *Exhibit C: Minimum Project Requirements for the North Berkeley Project*
- *Exhibit D: Methodology for Establishing Developer Requirement to Comply with Objective Design Standards*

**MEMORANDUM OF AGREEMENT RE NORTH BERKELEY AND ASHBY
TRANSIT-ORIENTED DEVELOPMENTS**

This Memorandum of Agreement (“**MOA**”) is entered into on this 29th day of June, 2022, by and between the San Francisco Bay Area Rapid Transit District (“**BART**”) and the City of Berkeley (“**City**”) (collectively the “**Parties**”) to cooperatively pursue transit-oriented development (“**TOD**” or “**the Projects**”) at the North Berkeley and Ashby BART stations. This MOA is made in furtherance of the Memorandum of Understanding between BART and City, signed on March 3, 2020 (“**MOU**”, attached hereto as Exhibit A), and the Joint Vision and Priorities Document approved by the City on June 2, 2022 and by BART on June 9, 2022 (“**JVP**,” attached hereto as Exhibit B), which addressed TOD projects at the North Berkeley and Ashby BART Stations. These projects are individually referred to respectively as the “**North Berkeley Project**” and “**Ashby Project**,” and collectively as the “**Projects**.” This MOA primarily addresses the North Berkeley Project. The Parties anticipate amending this MOA to address additional issues specific to the Ashby BART Project.

This MOA is not intended to cover all issues that may arise between BART and the City with respect to the Projects, but is intended to provide the Parties and potential developers a basic understanding as to how the Project negotiation and entitlement processes will proceed; the objectives and minimum requirements for the Projects in terms of design, affordability, and infrastructure; and the anticipated City and BART contributions to the Projects.

RECITALS

- A. In 2020, the Parties entered into the MOU to identify their shared vision and priorities for development of TODs at the North Berkeley and Ashby BART stations, to provide clarity on the process and timelines for pursuing development, and to begin to identify the roles and responsibilities of the City and BART in that process. Among other things, the MOU called on the City to establish a Community Advisory Group, reserve funding to support affordable housing development at the sites, and to adopt zoning for the sites consistent with AB 2923.
- B. On April 27, 2021, the Berkeley City Council unanimously adopted Resolution 69.833-N.S. which, in part, provisionally reserves \$53 million of City-controlled funds as the subsidy needed to achieve 35% affordable housing at the Ashby and

North Berkeley BART sites, allows for a portion of the funding to be considered for predevelopment, and directs the Berkeley City Manager ("**City Manager**") to investigate a new bond measure that could fund housing and/or housing related infrastructure needs at the two BART Stations and in the Adeline Corridor, or in the City as a whole, and to establish a timeline and community process for said bond measure, with a goal of maximizing affordable housing (up to 100%) at either or both sites.

- C. On June 28th, 2022 the Berkeley City Council adopted a new Chapter 23.202.150 in its Zoning Ordinance, as part of the City of Berkeley Municipal Code, adding a "Residential - BART Mixed Use (R-BMU)" zoning district, as well as additional conforming amendments to the General Plan and other sections of the Municipal Code in order to ensure that the provisions are comprehensively and consistently incorporated into its Zoning Ordinance, to govern development at the North Berkeley and Ashby BART stations.
- D. On June 9, 2022, the BART Board approved the JVP and on June 2, 2022, the Berkeley City Council approved the JVP with Resolution _____. The JVP expresses the City and BART's shared, high-level expectations for future development of both the Ashby and North Berkeley BART Stations. This document will be incorporated into BART's future Requests for Qualifications ("**RFQs**") for development of the Ashby and North Berkeley Station development, and will help guide the process from developer selection through project construction. Further negotiations will occur pertaining to the potential solicitation at the Ashby BART Station.
- E. With the above milestones completed, the purpose of this MOA is to clarify the processes that BART and/or the City will pursue from this date forward in seeking to realize construction of the North Berkeley Project, as well as to set out certain agreements with respect to the Ashby Project.
- F. As part of the work funded by a San Francisco Foundation Breakthrough Grant ("Equitable Black Berkeley"), the City of Berkeley is contracting with Creative Development Partners to support an innovative reparative approach to financing with a goal of increasing affordable housing, and supporting BART and the City to meet the goals of the JVP developed with input from the City's Community Advisory Group (CAG).
- G. Outstanding issues remain to be addressed prior to advancing development of the Ashby Project, including, but not limited to, ensuring a new permanent location

for the Berkeley Flea Market can be provided, the City’s option to acquire air rights for the Western Parking Lot, the potential reconfiguration of Adeline Street, the design and funding of station infrastructure, and the role of BART and the City in the developer solicitation process. It is anticipated that an amendment to this MOA, as well as completion of related agreements and documentation, will be needed in order to advance solicitation of a developer for the Ashby Project.

MUTUAL AGREEMENT OF THE PARTIES

I. Relationship to MOU

- A. This MOA amends and expands upon the MOU (Exhibit A) between the Parties to reflect changes in the anticipated project schedule and encompass topics not addressed in the MOU. The MOU remains in effect and its terms are only changed to the extent specifically noted in this MOA, or where provisions of this MOA are in direct conflict with provisions in the MOU, in which case the provisions of this MOA shall prevail. Terms of the MOU that are not in conflict with this MOA shall remain in effect.

II. Timeline for the Projects

- A. The Summary Table below reflects activities for the Projects anticipated to take place after the date of this MOA. It supersedes the Activities and Timelines Summary Table in section III of the MOU. BART and the City agree that the milestones and associated dates may be revised upon mutual written agreement of the City Manager or her designee and of the BART General Manager ("**General Manager**") or his designee. If the Parties do not complete an activity or a milestone by the date provided for said activity or milestone, and if the parties cannot identify a mutually acceptable later date for completion of the activity or milestone, then either Party may, upon 30 days’ written notice to the other Party, terminate this agreement as it applies to the Station to which the activity or milestone relates.

B. Activities and Timelines Summary Table

Activity	Lead Party	Milestone	Outside Date
1. Developer(s) Solicitation – North Berkeley Project	BART	RFQ Release for North Berkeley Project and Notice of Funding Availability for City Predevelopment Funding	July 1, 2022

<p>2. Developer(s) Selection – North Berkeley Project</p>	<p>BART Board of Directors</p>	<p>Identified development team (selected by a panel with equal City and BART representation), with demonstrated capacity (as outlined in the RFQ), to complete affordable housing projects representing at least 35% of anticipated housing for the entire site. If the milestone is not met, the City may rescind the \$500k in predevelopment funding available through the RFQ.</p>	<p>June 30, 2023</p>
<p>3. Execution of an Exclusive Negotiating Agreement (“ENA”) – North Berkeley Project</p>	<p>BART</p>	<p>ENA signed with Developer</p>	<p>No later than 9 months after Developer selection</p>
<p>4. City Affordable Housing Funding - Predevelopment Funding – Both Projects</p>	<p>City</p>	<p>Council award of predevelopment funds (if requested) to Developer</p>	<p>No later than 60 days after Developer Selection for each respective Station</p>
<p>5. Adoption of Objective Design Standards – Both Projects</p>	<p>City</p>	<p>Objective Design Standards adopted by City Council</p>	<p>No later than 9 months after ENA execution for each respective Station assuming both parties meet the terms outlined in Section IV.F below</p>
<p>6. Affordable Housing Strategy – Both Projects</p>	<p>City</p>	<p>Identify additional funding streams, if any and finalize City affordable housing funding plan</p>	<p>June 30, 2023</p>

7. City Application - Both Projects	Development team	Development team must submit a complete application for a Master Development Permit, or for at least one affordable housing building's entitlements/permit	No sooner than 9 months and no later than 3 years from execution of ENA for each respective Station
8. Project Financing	Development team	For each affordable housing project, development team must secure complete project financing. If this milestone is not met, the City may rescind the development funding reservation for that project.	December 31, 2031

III. Phasing and Funding for Affordable Housing for the North Berkeley Project

The Parties will strive to deliver new housing within 10 years to reflect the urgency of the climate and housing crises, acknowledging that housing, including affordable housing, may be developed in multiple phases over a number of years.

The Parties have committed to working together proactively to maximize the number of permanently affordable, deed-restricted housing units at the North Berkeley site, dependent on timely identification of sufficient funding and balanced with other JVP goals and BART infrastructure needs. The RFQ, ENA and other transaction documents will reflect the following agreement as a requirement: At a minimum, the North Berkeley Project shall include regulated affordable units comprising at least 35% of the new housing units to be developed at the site, inclusive of any bonus units granted as part of a density bonus application, at the affordability levels in the JVP, as described below. Affordability restrictions shall run for the duration of the ground lease(s) for all affordable housing components of the Project, which leases shall have a minimum duration of 65 years, and for any extensions thereto. In addition to the terms of said ground leases, the affordability restrictions will be enforceable by the City pursuant to regulatory agreements between the City and the developer(s).

Affordability Levels in the JVP:

- 1) At least 35% of new housing must be affordable to households earning an average of up to 60% of Area Median Income (“AMI”).
- 2) At least 20% of the required 35% affordable units must be affordable to households earning no more than 30% of AMI (“Extremely Low Income” or “ELI”, and

- 3) Additional affordable units aside from the ELI units should prioritize low income (80% of AMI) and very low income (50% of AMI) households but may include some housing restricted to households with moderate incomes (up to 120% of AMI), provided that the moderate-income units have rents that are still below market and shall not include City subsidy.

While the aforementioned goals are established in the JVP and the City and BART have policies regarding affordable housing requirements, any project receiving the City's Housing Trust Fund ("HTF") funding must meet the HTF Guidelines¹, which require that 40% of any City subsidized units be affordable to households earning up to 60% of AMI, and an additional 20% of City subsidized units to be affordable to households earning up to 30% of AMI. BART's TOD policy also provides a priority for affordable units that serve very low income (<50% AMI), low income (51-80% AMI) and/or transit-dependent populations.

A. BART Land Discount.

In order to facilitate the provision of deeply affordable housing, BART will provide the selected developer with a discount on land costs. In keeping with BART's *Framework for Financial Return from Affordable Housing*, higher levels of discount will be available to projects that provide more units at lower income levels. BART shall require the selected developer for the North Berkeley Project to utilize this land discount solely for the benefit of the affordable components of this Project. For the avoidance of doubt, the Parties acknowledge that this Section III.A applies to the North Berkeley Project only. The City and BART will address the BART discount on land costs for the Ashby Project at a later time.

B. City Funding

The City will make available a total of \$53 million in affordable housing funds, including up to \$4 million in predevelopment funds, for the Projects, and allocate funding to the Projects subject to each project's compliance with the Objective Design Standards (consistent with conditions in Section IV below), affordability requirements, project milestones (including without limitation the milestones noted in Section II.B above), and other requirements to be set forth in the funding agreements between the City and developer.

City will work to ensure an equitable distribution of City subsidy funding. It is anticipated that up to 50% of the City subsidy funds will be invested at the North Berkeley Project. However, if differences in timing of the Projects, the availability of outside subsidy, planned affordability levels or other factors result in a greater need for funding at one site than the other, the City may, in consultation with BART, choose to

¹ <https://www.cityofberkeley.info/ContentDisplay.aspx?id=6532>

allocate the funding differently. A minimum of \$20 million in City subsidy funds will be available to be invested at the North Berkeley Project, subject to Council approval of an HTF Program application. City acknowledges that the Minimum Requirements for housing affordability may not be achievable without this allocation.

The anticipated sources of City funding are as follows:

- 1) **Measure O Funding:** The City has reserved \$40 million in Measure O funding. It is the City's intention to invest up to \$20 million of these funds in the North Berkeley Project unless a different funding allocation is determined as noted above.
- 2) **Affordable Housing Mitigation Fees:** In addition, the City has reserved \$13 million in additional funding for the North Berkeley and Ashby sites from future Affordable Housing Mitigation Fee revenue, or from an alternative source of funding to be identified by the City by June 30, 2023, inclusive of any funds invested in predevelopment. It is the City's intention to invest up to 50% of this total (\$6.5 million) at the North Berkeley site.
- 3) **Potential Future Bond Measure:** The City Manager is investigating a new bond measure, as described above in Recital B, which if passed by the voters could provide additional City funds to increase the provision of affordable housing within the projects.

C. Predevelopment Funding.

As authorized by City Council, the City will reserve up to \$2 million in predevelopment funding for the North Berkeley site from its HTF to enable nonprofit affordable housing developers to undertake predevelopment expenses. The predevelopment funding described in this Section III.C will only be available to nonprofit affordable housing developers, but shall be available whether the nonprofit is the lead developer or a member of a development team. In the event that there is a joint venture, the City will review the joint venture operating agreement and organization chart for the sole purpose of confirming the roles and relationship of the venture partners and the period of time the joint venture will be in force. The predevelopment funding will be made available in two phases:

1. **Phase 1 predevelopment funding** is available during the RFQ process to support a non-profit developer to fund early predevelopment costs. The RFQ will jointly serve as an application for this Phase I predevelopment funding from the City. Following developer selection by the BART Board of Directors, the City will consider approval of up to \$500,000 total for eligible non-profit developers requesting this funding. Disbursement of the Phase 1 predevelopment funding will be conditioned upon execution of an ENA, the terms of which are consistent with the requirements of this MOA.

2. **Phase 2 project-specific predevelopment funding** consistent with the HTF Guidelines and implementing procedures, including site planning, infrastructure planning, access planning, engineering, architecture and financing expenses (but excluding land acquisition costs). Following the submittal of an affordable housing proposal and financing plan (including a project pro forma), an eligible developer may then request the remaining predevelopment funds (up to \$1.5 million), which the City will recommend the Council approve if it determines the developer's proposal and financing plan are feasible and meet funding agreement conditions. Disbursement of the Phase 2 predevelopment funding will be conditioned upon execution of an ENA, the terms of which are consistent with the requirements of this MOA.

City predevelopment funding will, via the mechanism of the Predevelopment Loan Agreement between the City and the developer, be secured by the work products created by the developer, which shall become the property of the City if the developer defaults. As to other shared costs, predevelopment funding may be used to pay for no more than the pro-rata share attributable to the portion of the project restricted to serving tenants with incomes up to 120% of AMI plus any associated manager's units based on net rentable square footage. For Phase 1, the pro rata share will be determined based on the percentage of housing up to 120% AMI per the selected developer's preliminary development concept. Phase 2 can only fund predevelopment costs that are directly tied to a standalone 100% affordable development.

The Parties will work together to ensure that the submittal requirements and selection process provide an opportunity for the City to evaluate potential applications for eligibility for predevelopment and development subsidy from the City's HTF and Measure O bond proceeds prior to selection. The City agrees to accept the executed ENA as proof of site control for purposes of committing predevelopment funds. The terms and conditions for disbursement of City predevelopment funds will be established in a Predevelopment Loan Agreement between the City and the developer/borrower.

The Predevelopment Loan Agreement may require that developer reimburse the City for disbursed predevelopment loan funds if entitlement milestones are not met per Section II Table B., or if the proposed project is inconsistent with any Objective Design Standards then in force, or other terms and conditions of the Predevelopment Loan Agreement.

D. Development Funding for the Projects

The Parties expect funding for affordable housing development to come from City subsidies (Measure O and HTF), a developer contribution associated with any market rate

development, and other sources. The affordable housing developer will be responsible for identifying and leveraging available funding sources, including state and federal funding programs.

BART and the City require that development submittals in response to the developer solicitations include a preliminary development concept. This shall include a preliminary phased development timeline, the desired dates for receiving and drawing on funding commitments from the City, and the anticipated completion of affordable housing. The phased development timeline will include concurrency requirements to ensure that affordable units are constructed prior to or concurrently with any market-rate housing component. No market rate housing will receive its notice to proceed until an affordable housing project receives its notice to proceed. In the event there are multiple phases of market rate or affordable housing, the phasing plan shall be approved to ensure consistency with the JVP goal of affordable housing being built along with market rate housing.

The City will award development subsidy loan funds remaining after the award of any predevelopment funding based on detailed proposals provided by the selected affordable housing developer. The final commitment of development funding reserved for the North Berkeley site will be awarded based on compliance with the Objective Design Standards – Provided the Objective Design Standards satisfy the requirements in Section IV - and the City’s HTF Guidelines and the terms and conditions of the funding agreement described below.

The City’s development funds shall be subject to the terms of a funding agreement with the affordable housing project developer and shall be contingent on compliance with the Minimum Requirements, attached hereto as Exhibit C, as well as the requirements set forth in the funding agreement, including the following:

- 1) The project must comply with EIR mitigation measures and relevant City of Berkeley standard conditions of approval.
- 2) The project must abide by any applicable requirements to give preference for residents of Berkeley who are facing displacement (or who have been displaced from Berkeley in the past due to economic or discriminatory reasons).
- 3) The development team must comply with project-labor provisions required of City of Berkeley projects.
- 4) The development team must comply with the City’s local hire policies (Community Workforce Agreement, First Source), and submit a plan for compliance that is acceptable to the City, including additional measures the team will include to increase local hire outcomes.

The award of City development funds will be conditioned upon entitlement and construction milestones established in the reservation resolution and funding agreement adopted by City Council, consistent with the approved application for funding. The City Council may grant the City Manager authority to extend timelines within established parameters.

The City's contribution of affordable housing funding cannot be used to fund the units required by the City's inclusionary requirements and shall be applied towards any affordable housing units in excess of the City's inclusionary requirements at the time of entitlement. The developer of any market rate component of the project must comply with the inclusionary requirement without City subsidy and will be expected to demonstrate how they are satisfying the City's inclusionary requirements.

E. Performance Milestones.

The City's commitment to the use of funds for North Berkeley site is conditioned on the milestones shown in Section II. Table B. If either BART or the development team fails to meet the milestones in Table B, as may be extended as provided herein, the City would then have the option to release the site's portion of the reserved funds for use in other affordable housing projects elsewhere in the city.

F. Revised Affordable Housing Strategy for the Projects

The City of Berkeley will pursue its best efforts to secure additional local affordable housing subsidy to increase the proportion of affordable housing provided at the Projects, whether through the issuance of another voter-approved affordable housing bond and/or other financing mechanisms.

As referenced above in Table II. B, Activity 6, the City reserves the right to, by June 30, 2023, identify additional funding streams to increase the total affordable housing proportion for the Projects to be higher than 35% of units.

IV. AB 2923 Streamlining, Objective Design Standards and JVP for the Projects

- A. Entitlement Streamlining.** Public Utilities Code section 29010.7(b), codified by the adoption of AB 2923, establishes that TOD projects at BART stations that meet certain minimum requirements will be eligible for streamlining pursuant to Government Code section 65913.4., codified by the adoption of Senate Bill 35 (“**SB 35**”). To minimize entitlement risk, reduce project costs and accelerate the entitlement phase of development, the Parties intend that the developers of the Projects shall have the ability

to utilize any state laws providing for entitlement streamlining mechanisms included but not limited to AB 2923 and SB 35, to the extent a Project qualifies for streamlined review, such that project entitlements are ministerial and not subject to discretionary review.

- B. Community Input and Objective Design Standards.** In recognition of the City’s significant contribution of funding for the Projects’ affordable housing component, the Parties desire to maintain the ability for the City and community to provide effective input as to the character of development proposed at the Projects. The Parties agree that the primary vehicles for City and community input have been the newly adopted section 23.202.150 of the City’s Zoning Code and the newly adopted JVP, and additional community input will occur in developing the Objective Design Standards (“ODS”), as addressed in Section V.C, below. The Parties understand and agree that under AB 2923 and SB 35, a development application that qualifies for streamlined review is subject to ODS that have been duly adopted by the City prior to the submittal of the development application consistent with the timeline shown in section II.B, and that such ODS are enforceable as permit conditions by the City, provided the ODS are compliant with conditions in this Section IV.
- C. Development of Objective Design Standards.** BART will fund, and has retained, a consultant, to be directed by the City, to work with both Parties and community stakeholders to create a set of ODS and bring them to the City Council for adoption. ODS will be created separately for the North Berkeley and Ashby stations, and the process will be generally timed to coincide with developer selection of each Station as referenced in Section II.B above. The Berkeley community, BART, and the selected Developer will be given the opportunity to provide input into the Objective Design Standards to ensure the resulting document is consistent with what can feasibly be developed at each station and aligned with the intent of the JVP.
- D. Objective Design Standards Review and Approval.** Once a complete draft of Objective Design Standards has been prepared for each site, City staff will bring the draft to the Planning Commission for recommendation and to the City Council for adoption by ordinance. Prior to Planning Commission review, the City will provide BART an opportunity for final review and comment on the final draft of the Objective Design Standards.
- E. Requirements for Objective Design Standards.** The Parties agree that the intent of the Objective Design Standards is to allow the City, the community, BART, and the developer to have a strong voice in the design quality of the development at both stations. The Parties further agree that the Objective Design Standards shall be consistent with the

Zoning and with state law, including but not limited to SB 35, and that they shall be consistent with the sections of the JVP addressing the physical form of the Projects to the extent feasible.

The Objective Design Standards process will include 1) a circulation/access framework, prepared with input from the City and BART; 2) a preliminary set of objective design standards, prepared with input from the City and BART; and 3) a final set of objective design standards completed with additional input from community stakeholders and the selected developer. Main topics in the Objective Design Standards may include but are not limited to:

- Station functionality
- Public realm improvements
- Building form and massing
- Building façade design
- Building placement (i.e. transitions in height/scale)
- Open space and landscape

- F. **Requirement to Comply.** BART’s AB 2923 Development Principles, adopted by the BART Board of Directors in August 2020, states that “*if a jurisdiction shares BART’s commitment to regional climate, housing, and equity goals – as evidenced by zoning BART property for the highest feasible density, use and height – BART commits to encouraging consistency with that jurisdiction’s objective design standards in its development agreements.*”

Consistent with the Development Principles, BART agrees that a zoning of a minimum of 75 units per acre and at least 7 stories in height satisfies the Development Principles of this policy. BART agrees to enforce the City’s Objective Design Standards through its ENA and other real estate agreements, provided that the resulting ODS are consistent with applicable state law, including but not limited to SB 35, and with all other requirements for the ODS established by this MOA, and so long as they do not diminish the zoning envelope by more than ten percent (10%) below what AB 2923 heights and floor-area-ratio would allow, as calculated based on the maximum square footage that could be built with a reasonable circulation framework and open space provided, utilizing the methodology attached hereto as Exhibit D.

In addition, BART shall, in its ENA, require the developer to make good faith efforts to cooperate with the City in the development of Objective Design Standards so that they can be brought forward for review and approval. In the event the City cannot adopt the ODS within 9 months of execution of the ENA due to occurrences or circumstances beyond the City’s reasonable control, including but not limited to, acts of God, fire,

strikes or other labor disturbances, riots, civil commotion, war, sabotage, pandemic, failure of the developer to make good faith efforts to cooperate with the City in the development of the Objective Design Standards, or any other cause similar to those herein specified which cannot be controlled by the City, then the City Manager and General Manager may agree to extend the deadline for adoption of the ODS to a mutually agreeable, later date.

V. Developer Selection Process for North Berkeley Project

- A. General.** To solicit developers or developer teams for the North Berkeley site, BART will issue an RFQ. BART will work closely with the City to draft the RFQ and to evaluate respondents (as outlined in the sections below) and make the developer selection. The City will work with BART to incorporate the eligibility criteria outlined in the HTF Guidelines into the RFQ, to ensure the selected developer team is qualified to deliver on the goal of providing at least 35% affordable housing at the site. The RFQ will also describe the Minimum Project Requirements defined in Exhibit C.

The RFQs will be intended to solicit interested developers or developer teams and to evaluate their experience, ability to successfully deliver a project, general project concept and financial wherewithal. Respondents requesting City funding will be required to provide additional information on the affordable housing projects including a financing plan and pro forma.

- B. Selection Committee.** A selection committee will be formed by BART staff, consisting of six or eight members, divided equally between City and BART representatives as identified by each respective party.
- C. Evaluation Process.** Initial responses will be evaluated by the selection committee and a shortlist of up to four teams will be created. Shortlisted teams will be asked to present at a community townhall and may be asked to submit supplemental materials. After the townhall (referenced below in section F) has taken place, shortlisted firms will be interviewed by the selection committee and then the committee will score the teams and present a recommended selection to the General Manager and City Manager. If the General Manager and City Manager are not both in agreement with the recommendation of the selection committee, the Parties agree to meet and confer in good faith to reach agreement, but the General Manager retains sole discretion to make a recommendation to the BART Board of Directors. The City Manager retains sole discretion to make a recommendation to the full Berkeley City Council on the City's predevelopment and development funding award.

- D. Predevelopment Funding.** The submittals received in response to the RFQ will also serve as applications for affordable housing predevelopment funds from the City, although developer teams comprised solely of one or more for-profit development companies shall not be eligible for such funding, in keeping with City policy. Following developer selection by BART Board of Directors, City staff will bring the selected team’s application for predevelopment funding of up to \$500k to the City Council for approval. The selected developer team may apply for an additional \$1.5 million in City predevelopment funds for specific affordable housing projects proposed at the North Berkeley BART site.
- E. Selection Criteria.** The selection criteria have been derived from the JVP, as well as applicable policies of BART, the City of Berkeley's HTF Guidelines and affordable housing funding policies. Proposals will be evaluated based on depth and quantity of affordable units, among other criteria. The selected development team’s responses must demonstrate a commitment to affordable housing, and feasible plans to produce it at these sites. The selected team must have a track record in the production of affordable housing and will need to demonstrate their capacity to deliver on the goal to develop at least 35% affordable housing at the North Berkeley site. The RFQ will emphasize that the development team will be held accountable for making affordability the first priority.
- F. Public Involvement in Selection Process.** Shortlisted firms will be asked to present their qualifications at an online or in-person townhall hosted jointly by the City and BART, open to the general public. Community members who attend will be offered the opportunity to give structured feedback on a number of aspects of the presentations, but will not be asked to rank or score the respondents overall. This feedback will be assembled by BART and City staff or consultants and transmitted to the selection committee.

VI. BART/City Cooperation on the Projects

- A. Commitment to Cooperate.** BART and the City agree that the development of the Projects is both a shared opportunity and a shared responsibility, and commit to working collaboratively throughout the development process.
- B. Project Funding.** BART and City will proactively work with developers to secure grants (state, federal) and financing for the Projects, which is necessary to realize the public benefits described in this MOA. BART will take priority on use of Infrastructure Infill Grant Program (“**IIG**”) funding for station access infrastructure. Any available IIG funding not needed for station access costs will be made available for affordable housing infrastructure. BART will source funding for BART ridership replacement

parking, and City will support a joint application for IIG funding for this purpose if no other funding sources are available.

- C. **Parking Strategy.** The City will take the lead, working with BART, to identify ways to mitigate impacts of spillover parking, including possible developer requirements. The City will determine its new on-street parking strategy surrounding the Projects by November 1, 2022, The City will implement this plan no later than execution of BART's first ground lease with developer.

VII. **Timeline for Ashby Project and Related Agreements**

Development of a TOD project at the Ashby Station will require resolution of a number of items specific to that site, including, without limitation, the City's option to acquire air rights for the Western Parking Lot, identification of a new location for Berkeley Community Flea Market, the potential reconfiguration of Adeline Street, the design and funding of station infrastructure, affordable housing requirements, and the role of the City in the RFQ, potential RFP and ENA process. The Parties have been working to resolve these items and will make a good faith effort to complete the aforementioned items by the dates provided below. BART and the City agree that the milestones and associated dates may be revised upon mutual written agreement of the City Manager or her designee and of the BART General Manager ("**General Manager**") or his designee.

The Parties will incorporate the dates below as part of an amended MOA to be negotiated by the Parties. It is understood that if the Parties are unable to reach resolution on the aforementioned items, and these dates are not met, BART reserves its right to reprioritize its transit-oriented development work plan and advance a different developer solicitation elsewhere in its system in early 2023.

Notwithstanding the foregoing or anything to the contrary contained herein, if the Parties are unable to reach resolution on the aforementioned items or to agree to an amended MOA as contemplated in the first paragraph of this Section VII, this MOA shall continue in full force with respect to those provisions that relate to the North Berkeley Project.

Milestone	Date
Agreement on nature of solicitation and its content for Ashby TOD Project	September 30, 2022
Agreement on process for issuance of Ashby solicitation including schedule, City's role in evaluation, evaluation criteria	
Clear milestones for Equitable Black Berkeley process and agreement on its relationship to RFQ	
Amended MOA for Ashby project to be Approved by City Council and BART Board	November 1, 2022
Resolution of City option for air rights at Ashby BART West lot, and City Council action.	
Agreement on new Flea Market location by City Council which may include some portion of the Adeline right of way to be used for a Flea Market; City Council agreement on roadway reconfiguration for Adeline Street	
Execution of agreements related to air rights	November 30, 2022
Release of Ashby Solicitation (contingent on meeting above milestones)	March 31, 2023
Finalize City affordable housing funding plan including % and level of affordable housing at Ashby	June 30, 2023
City Council adoption of Objective Design Standards for Ashby TOD	No later than 9 months after ENA assuming both parties meet the terms outlined in Section IV.F above
Development Team for Ashby must submit a complete application for a Master Development Permit, or for at least one affordable housing building's entitlements	No later than three years of execution of the ENA
Development team for Ashby must secure complete project financing for affordable housing components	December 31, 2031

VIII. Continuing Community Participation.

After its final meeting on December 6, 2021, the Community Advisory Group (“CAG”) has completed its intended function. The Parties agree to continue community participation in the development of the BART stations in a mutually agreed upon framework.

IX. Miscellaneous

Notwithstanding any provision herein to the contrary, nothing in this MOA shall be construed as limiting the discretionary decision-making authority of the City or BART. No party shall be liable for, or shall be entitled to, any monetary damages for breach of this MOA, and each party expressly waives its rights to damages. There are no intended third-party beneficiaries of this MOA, and no third party shall have any enforcement or other rights under this MOA against City or BART.

CITY OF BERKELEY

DEE WILLIAMS-RIDLEY
CITY MANAGER

JESSE ARREGUÍN
MAYOR

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

ROBERT M. POWERS
GENERAL MANAGER

Exhibit C: Minimum Project Requirements for the North Berkeley Project

Housing

- The residential program for the Project should include at least 1,000 bedrooms with a variety of unit sizes.
- At least 35% of the new housing units to be developed at the North Berkeley Project, inclusive of units built to satisfy the City’s inclusionary requirement and any units that may be added as a result of a density bonus, shall be affordable or Below Market Rate (BMR) for the duration of BART’s ground lease(s) for all affordable housing components of the Project, which leases shall have a minimum duration of 65 years, and for any extensions thereto. In addition to the terms of said ground leases, the affordability restrictions will be enforceable by the City pursuant to regulatory agreements between the City and the developer(s), in accordance with the income targets identified in the JVP as follows:
 - At least 35% of new housing must be affordable to households earning an average of up to 60% of Area Median Income (“AMI”).
 - At least 20% of the required 35% affordable units must be affordable to Extremely Low-Income (“ELI”) households, those earning up to 30% of AMI.
 - Of the required 35% affordable units, additional affordable units aside from the ELI units should prioritize Very Low Income (up to 50% of AMI) households and Low Income (up to 80%) households but may include some housing restricted to households with moderate incomes (up to 120% of AMI), provided that the moderate-income units have rents that are still below market and shall not include City subsidy.
 - While the aforementioned goals are established in the JVP and the City and BART have policies regarding affordable housing requirements, any project receiving the City’s Housing Trust Fund (“HTF”) funding must meet the HTF Guidelines, which require that 40% of any City subsidized units be affordable to households earning up to 60% of AMI, and an additional 20% of City subsidized units to be affordable to households earning up to 30% of AMI. BART’s TOD policy also provides a priority for affordable units that serve very low income (<50% AMI), low income (51-80% AMI) and/or transit-dependent populations.
- Affordable units shall be constructed prior to or concurrently with any market-rate housing component. No market rate housing will receive its notice to proceed until an affordable housing project gets its notice to proceed. In the event there are multiple phases of market rate or affordable housing, the phasing plan shall be approved to ensure consistency with the JVP goal of affordable housing being built along with market rate housing.
- Affordable units may be clustered into one or more 100% affordable housing buildings on the Property but must be designed in a way that integrates with the larger project and shares the comparable design standards and quality.

Public & Civic Space

- The cost, if any, to BART and the City of operating and maintaining the new civic space must be minimized.
- The project must provide a connection to the Ohlone Greenway.
- Station access improvements must provide options for people of all ages, abilities, races and ethnicities, genders and income levels.
- Neither the City nor BART will be responsible for maintenance of roads and pathways created on the parcels to facilitate the project.

Station Access & Parking

- Affordable housing and other community benefits will be prioritized over on-site BART rider parking and TOD resident parking. The BART Board will establish a maximum amount of on-site BART rider parking for each station.
- Consistent with current Berkeley Municipal Code, project residents will not be able to secure residential parking permits (“RPP”) for City streets, to prioritize new residents utilizing more sustainable transportation options and address concerns from nearby residents about parking spillover.

Additional Minimum Requirements

- The project must comply with all relevant applicable BART and City policies and ordinances to the extent allowable by law. BART’s relevant policies can be found at www.bart.gov/TOD and currently include its Transit-Oriented Development Policy, Affordable Housing Policy, AB 2923 Development Principles, Project Stabilization Agreement Policy for Transit-Oriented Development, and Labor Peace Agreement Policy for Transit-Oriented Development Hotel Operations.
- Developers must show a feasible path to obtaining entitlements by January 1, 2025, and to completion of construction by 2031, and must make best efforts to meet those deadlines.

Exhibit D: Methodology for Establishing Developer Requirement to Comply with Objective Design Standards

BART will require the developer to comply with City's future Objective Design Standards ("ODS") for the North Berkeley BART site utilizing its real estate agreements, provided:

1. The City's adopted zoning for the Project, as it relates to AB 2923, allows a minimum of 75 units per acre, at least 80 feet, and at least 7 stories in height;
2. The ODS will be adopted by the City of Berkeley for the BART property within 9 months of ENA execution as provided for in the MOA
3. The ODS are consistent with the City's Zoning Ordinance;
4. The ODS are consistent with state law including but not limited to SB 35 and, as it relates to parking standards, AB 2923; and
5. The gross square footage allowable under the ODS ("ODS Capacity") is not less than 90% of the baseline square footage allowable under AB 2923 floor to area ratio (FAR) ("AB 2923 Baseline Capacity"), as specified below.

Net Developable Area

Both the ODS Capacity and AB 2923 Baseline Capacity will utilize the same net developable area in their calculations. This is defined as the gross site area of the North Berkeley BART Project, exclusive of the auxiliary lots, and exclusive of surface areas utilized for public site circulation, public civic space, and BART infrastructure. The Net Developable Area will be determined based on the following methodology:

- The Selected Developer's preliminary development concept shall establish the initial concept for the net developable area.
- Within 30 calendar days of ENA execution, both BART and City staff shall provide comments to one another on changes required to ensure the net developable area is compatible with BART and City operational and fire/life safety needs.
- Within 45 calendar days of ENA execution, BART and City staff shall meet to combine their respective comments into a single set of changes to be submitted to the developer. If BART and City staff cannot resolve any conflicts between their comments within this time, the City's Planning Director and BART's Chief Planning & Development Officer shall confer to address any disputes.
- The Selected Developer shall have 30 additional calendar days after receipt of the combined BART and City comments to incorporate them into the final net developable area. Both BART and the City must mutually agree that the Selected Developer has addressed all comments. If the Selected Developer believes that comments would result in an inability to deliver a feasible development, the Selected Developer must notify BART and the City within 15 calendar days of receiving the combined BART and City comments so that the City and BART can confer to resolve any issues.
- The final Net Developable Area shall be used solely for the purposes of calculating AB 2923 Baseline Capacity and ODS Capacity, and shall not bind BART, the City or the Selected Developer in any way to this concept for their final project.

AB 2923 Baseline Capacity

The AB 2923 Baseline Capacity shall be calculated by multiplying the net developable area by 4.2, which is the minimum floor area ratio for Urban Neighborhood/City Center projects required by AB 2923.

ODS Capacity

The ODS Capacity shall be determined by calculating the gross square footage that is allowable on the Net Developable Area under the R-BMU zoning and under the ODS, accounting for square footage that is lost due to required setbacks, stepbacks, massing breaks, or other required features (e.g. fire and life safety requirements). This determination shall be made by a design professional such as a member of the American Institute of Certified Planners (AICP) or licensed architect, to be selected by mutual agreement of BART and the City.

Timing for Determining ODS Capacity

The ODS Capacity must be calculated prior to public release of the final draft ODS, to ensure that there will be transparency to the community about whether BART will require the developer to comply with the ODS.

Other Conditions

BART will not require developer compliance with any increase in parking requirements above the 0.5 spaces per unit required in AB 2923, but will require compliance related to height and massing provided above conditions are met. Square footage for parking will not count towards the ODS Capacity or Baseline Capacity Calculations.

Both Baseline and ODS Capacity will be calculated for the entirety of the Project, and not individual buildings or blocks.