SANDAG: 5003148 11-SD-125 P.M. 2.63 E.A. 2T1521 Dist. Agreement. No. 11-8411 Joint Use and Maintenance Agreement

#### JOINT USE AND MAINTENANCE AGREEMENT

THIS JOINT USE AND MAINTENANCE AGREEMENT (JU&MA or "Agreement"), ENTERED INTO EFFECTIVE **AUGUST 31, 2015** is between the STATE OF CALIFORNIA, acting by and through its Department of Transportation, referred to herein as "STATE", the SAN DIEGO METROPOLITAN TRANSIT SYSTEM, a State of California public agency, referred to herein as "MTS", and the SAN DIEGO ASSOCIATION OF GOVERNMENTS, a political subdivision of the State of California, referred to herein as "SANDAG." The following Recitals are acknowledged to be material terms of this Agreement.

#### RECITALS

- 1. STATE owns, controls and maintains certain lands and property for state highway purposes described as follows: on State Route 125 (SR-125), 0.4 miles north of Birch Road overcrossing (post mile 2.63), hereinafter referred to as "HIGHWAY RIGHTS-OF-WAY."
- 2. SANDAG and STATE have entered into an agreement which calls for, among other things, SANDAG to operate a toll facility on State Route 125 and for STATE to maintain said toll facility.
- 3. Pursuant to Public Utilities Code section 120000, et seq, MTS operates bus transit service, including Bus Rapid Transit (BRT), in portions of San Diego County.
- 4. SANDAG will construct various improvements including a bridge structure and ancillary power, communication and support systems (collectively the BRT GUIDEWAY) over the HIGHWAY RIGHT OF WAY in order for MTS to own, operate and maintain its BRT System. The BRT GUIDEWAY will not interfere or obstruct the use or maintenance of STATE's HIGHWAY RIGHTS OF WAY, their operation or use by the public. SANDAG and MTS will assume full responsibility for operations, maintenance, liability, repair, protection, replacement and ultimate or interim removal of said BRT GUIDEWAY as specifically set forth herein, unless otherwise agreed upon by STATE, SANDAG and MTS.
- 5. SANDAG will construct and MTS will solely own, control, operate and maintain the BRT GUIDEWAY within the HIGHWAY RIGHTS-OF-WAY as shown on JOINT USE

AND MAINTENANCE AGREEMENT MAP 35333-1 hereinafter referred to as "JOINT USE AREA" or "JUA", attached hereto and made part of this Agreement. STATE and MTS also desire to define the terms and conditions and establish responsibility to those areas of the HIGHWAY RIGHTS-OF-WAY and JOINT USE AREA more specifically described below.

- 6. The permitted joint use of HIGHWAY RIGHTS-OF-WAY by MTS for its BRT GUIDEWAY will be effective upon completion of construction and acknowledgment of MTS's acceptance of the BRT GUIDEWAY within the JOINT USE AREA by STATE. STATE's acknowledgment shall not be unreasonably withheld.
- 7. SANDAG, MTS and STATE acknowledge that the BRT GUIDEWAY is a TransNet funded project.
- 8. Construction of the BRT GUIDEWAY within HIGHWAY RIGHT-OF-WAY will be the subject of a separate Agreement.

#### **SECTION I**

### **STATE AGREES:**

- 9. To issue at no cost to SANDAG and/or MTS and their agents, upon proper application to STATE, an encroachment permit authorizing SANDAG and MTS entry into JOINT USE AREA when using surface access from highway shoulders and median, for the purpose of maintenance, repair, protection, replacement, removal, construction, and reconstruction of the BRT GUIDEWAY.
- 10. MTS shall have access to the JOINT USE AREA through the BRT GUIDEWAY from East Palomar Street and Town Center Drive for the purpose of the BRT operations, repair, protection, and maintenance without needing an additional encroachment permit from the STATE. Access by MTS, SANDAG or any contractor, subcontractor or agent from any other point will require an encroachment permit from STATE.
- 11. To attempt to operate and maintain its existing HIGHWAY RIGHTS-OF-WAY in such manner as to not unreasonably interfere with the operation of the BRT GUIDEWAY.
- 12. The JOINT USE AREA is delineated and defined on a map consisting of 1 sheet entitled "JOINT USE AND MAINTENANCE AGREEMENT MAP 35333-1" (Exhibit A), which is to be recorded with this Agreement in the County Recorder's Office of San Diego. Coordinate geometry information depicted on said map will be based on construction documents and may be adjusted by SANDAG, MTS and their agents, if necessary, in accordance with final as-built drawings. Said adjustment will be subject to an Amendment to this Agreement and will also require recording in the County Recorder's Office of San Diego County.

#### 13. STATE Point of Contact:

Gustavo Dallarda 4050 Taylor Street San Diego, CA 92110 (619) 688-6738

#### **SECTION II**

#### **SANDAG AGREES:**

- 14. SANDAG agrees to contribute to the construction, operation and maintenance obligations set forth herein to the extent allowed by the TransNet Extension Ordinance and Expenditure Plan. In the event TransNet funding is no longer available to fund these obligations, through exhaustion of the allocated TransNet funds and/or expiration of the TransNet Extension Ordinance, SANDAG and MTS agree to work in good faith and use best efforts to identify an alternative funding source sufficiently in advance of the exhaustion or expiration of the allocated TransNet funds so as to ensure compliance with the obligations set forth in this Agreement.
- 15. SANDAG point of contact during construction of the BRT GUIDEWAY:

Bruce Schmith SANDAG 401 B Street, Suite 800 San Diego, CA 92101 (619) 595-5613

#### MTS AGREES:

- 16. The BRT GUIDEWAY facilities within the maintenance area boundary as shown in Exhibit A ("JOINT USE AND MAINTENANCE AGREEMENT MAP 35333-1"). The MTS maintenance area shall include the area above the BRT GUIDEWAY overcrossing soffit, or superstructure. Facilities shall include all BRT GUIDEWAY including but not limited to utilities, structures, power installations, lighting, fences, signs, gates, signaling, and drainage facilities that are within the maintenance area boundary and that may be required for the benefit or control by MTS of its BRT. The MTS and STATE maintenance areas are depicted in Exhibit B.
- 17. After completion of construction, to perform all actions necessary for the operation, maintenance, repair, protection, and relocation, removal, and reconstruction of the BRT GUIDEWAY unless the parties otherwise agree in writing. All said work within the

JOINT USE AREA, whether handled by SANDAG, MTS or STATE, shall be developed in accordance with STATE and MTS policies, procedures, practices, standards, specifications, and regulations and shall be subject to inspection by STATE. MTS shall, upon notice from STATE that an unsafe or non-compliant condition exists, act within a reasonable time to correct such unsafe or non-compliant condition. In the event MTS fails to perform after notice from STATE, STATE shall proceed to take necessary corrective action and MTS shall be billed and shall pay all costs for such corrective work performed by STATE.

- 18. To apply for and cause its contractors at every tier to apply for all necessary encroachment permits authorizing entry into JOINT USE AREA other than as authorized in Paragraph 10 including for the purposes of inspection, maintenance, repair, protection, replacement, removal, construction and reconstruction of the BRT GUIDEWAY.
- 19. Acknowledging STATE's title and superior rights to HIGHWAY RIGHTS-OF-WAY and parcels covered by this AGREEMENT, to give 30 days advance notice to STATE before performing any work on BRT GUIDEWAY located in the JOINT USE AREA except for normal maintenance performed in MTS's operations area and consistent with Paragraphs 10 and 16.
- 20. That no work will be performed over the traveled way or shoulders of the STATE's roadways located with the HIGHWAY RIGHTS-OF-WAY, nor shall any improvements, modifications, replacement, removal, or relocation of the BRT GUIDEWAY be made by MTS within HIGHWAY RIGHTS-OF-WAY without prior consent by STATE where that work may impact the operation or safety of the HIGHWAY RIGHTS-OF-WAY, or the structural integrity or geometrics of STATE's facilities or structures. Prior approval by STATE shall consist of a standard form of encroachment permit issued by STATE at no cost to MTS. However, MTS may be required to enter into future Cooperative Agreements with STATE to define the cost and responsibilities for STATE's Project Support Services, including but not limited to design development reviews, construction inspection and/or oversight, related to any present or future improvements, protection, modification, replacement, removal, or relocation of the BRT GUIDEWAY performed by MTS or their respective agents. STATE's and MTS's prior approvals will not be unreasonably withheld, conditioned or delayed.
- 21. To, at no cost to STATE, keep and maintain the BRT GUIDWAY within the JOINT USE AREA in a state of good repair, free of all debris and graffiti, and free of all flammable and hazardous materials (as defined in Article 9) except for those materials necessary for, or incidental to the operation of MTS's BRT GUIDEWAY. MTS shall at all times maintain BRT GUIDEWAY in an orderly, neat, safe, and sanitary condition.
- 22. To take all steps reasonably necessary to protect HIGHWAY RIGHTS-OF-WAY facilities and structures, including, but not limited to, foundations, bridge, signs, and lighting, columns and landscaping over, under, above or adjacent to the JOINT USE AREA from damage due to MTS's presence or activities as the case may be. Any damage done to HIGHWAY RIGHTS-OF-WAY facilities, structures, and landscaping due to MTS's presence or activities in the permitted JOINT USE AREA shall be

repaired in a reasonable time at MTS's sole expense and MTS shall immediately cease those activities giving rise to that damage or modify their operations so as to prevent any further damage. If MTS doesn't complete repairs in a reasonable amount of time, STATE will proceed with necessary repairs and bill MTS of said repair work.

- 23. To not erect any kind of sign that is not necessary for the operation of MTS's BRT GUIDEWAY within the JOINT USE AREA. All signs must not interfere with the safety and operation of motor vehicles on HIGHWAY RIGHTS-OF-WAY. Such signs shall not be attached to or painted on STATE's highway facilities or structures except with the prior written consent of STATE, which consent shall not be unreasonably withheld, conditioned, or delayed.
- 24. In the operation, maintenance and, repair of the BRT GUIDEWAY within the JOINT USE AREA to not locate any lights thereon or adjacent thereto which would interfere with the safety and operation of motor vehicles on HIGHWAY RIGHTS-OF-WAY.
- 25. To not, in the JOINT USE AREA, construct, install, or operate any gasoline supply station, or permit the bulk storage of gasoline, petroleum products or hazardous materials. For the purpose of this JU&MA, "hazardous materials" shall mean any material that, because of its quantity, concentration or physical or chemical characteristics is deemed by any federal, state, or local government authority to pose a present potential hazard to human health or safety or to the environment. "Hazardous Material" includes, without limitation, any material or substance defined as a "hazardous substance" or "pollutant" or "contaminant" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, also commonly known as the "superfund" law, as amended (42 U.S.C. Sections 9601 et seq.) ("CERCLA"), or pursuant to Section 25316 of the California Health and Safety Code; any "hazardous waste" listed pursuant to Section 25140 of the California Health and Safety Code; any asbestos and asbestos containing materials; and, petroleum including crude oil or any fraction thereof, natural gas or natural gas liquids.
- 26. Upon completion of construction of the BRT GUIDEWAY and STATE's acknowledgment of MTS's acceptance of the BRT GUIDEWAY constructed within the JOINT USE AREA, MTS shall obtain and maintain Property Insurance on all risk forms, including flood insurance but excluding earthquake, insuring against the perils of fire, lightening and vandalism in an amount equal to the full replacement value of the BRT GUIDEWAY within the JOINT USE/ MAINTENANCE AREA.
- 27. Following construction of the BRT GUIDEWAY within the JOINT USE AREA, except for transfer or assignment to SANDAG, no transfer or assignment of MTS's primary responsibility for design, construction, operation, maintenance, improvements, modification, protection, replacement, removal, or relocation of the BRT GUIDEWAY shall be made to any third party without the prior written consent of the STATE. Such consent shall not be unreasonably withheld. Any successors in interest to MTS will be required to adhere to the terms of this JU&MA and any operation, maintenance, improvements, modification, protection, replacement, removal, and relocation restrictions issued by the STATE.

28. Should MTS permanently cease operation of the BRT GUIDEWAY and no other STATE approved agency or entity has taken over MTS's BRT GUIDEWAY, MTS, at STATE's sole option, unless otherwise agreed upon in writing by the parties, shall remove all or designated portion of the GUIDEWAY within HIGHWAY RIGHTS-OF-WAY and restore HIGHWAY RIGHTS-OF-WAY to a condition reasonably acceptable to STATE at MTS's sole expense. Upon notice from MTS of their intent to permanently cease operation of the BRT GUIDEWAY, STATE shall have twelve months to exercise its right under this Paragraph and demand that MTS remove all or some of the BRT GUIDEWAY. Failure of STATE to make such demand within twelve months shall be deemed a waiver of this provision and the ownership of the BRT GUIDEWAY provisions shall be transferred to STATE upon the date MTS permanently ceases operation of the BRT GUIDEWAY or eighteen months after receipt of the MTS notice, whichever occurs last.

#### 29. MTS Point of Contact:

Timothy Allison Manager of Real Estate Assets San Diego Metropolitan Transit System 1255 Imperial Av., Suite 1000 San Diego, CA 92101-7490 (619) 595-4903

### **SECTION III**

#### **IT IS MUTUALLY AGREED:**

- 30. Each party shall notify the other in writing of any areas requiring maintenance as set forth in this AGREEMENT to be done by the other party. The requested maintenance shall be initiated within 10 working days and completed within 30 working days of notification. The responsible party shall perform with due diligence to completion said maintenance. If requested maintenance is not completed within said time frames the responsible party shall notify the other party in writing of proposed completion date. For that which is within the STATE's HIGHWAY RIGHTS-OF-WAY, if a mutually acceptable date is not agreed upon, the other party reserves the right to perform said maintenance and shall be reimbursed by the responsible party for all costs associated for said maintenance. Funds shall be remitted to the other party within 90 days of completion of said maintenance.
- 31. Exceptions to general maintenance responsibilities shall include:

LOCATION 1 (East Palomar Overcrossing, as shown in sheet 1 of 2 "JOINT USE AND MAINTENANCE AGREEMENT MAP 35333-1", attached hereto)

STATE will maintain, at STATE expense, all facilities and property, and MTS structure below the soffit within HIGHWAY RIGHTS-OF-WAY.

- 32. STATE specifically reserves an unrestricted right of entry to BRT GUIDEWAY for the purpose of inspecting improvements, safety conditions, and any work located in the JOINT USE AREA to ensure the protection, maintenance, and operation of HIGHWAY RIGHTS-OF-WAY facilities. Except in the case of an emergency, STATE shall attempt to give at least five (5) working days advance notice to MTS of any need to access or cross BRT GUIDEWAY to MTS's operational area, and MTS's representative shall accompany STATE to ensure safety of MTS's BRT GUIDEWAY operation. In the event of an emergency, STATE will notify MTS immediately of its access needs.
- 33. STATE shall make every reasonable attempt to operate and maintain its highway facilities in such a manner as to not adversely affect MTS's BRT GUIDEWAY operations.
- 34. All BRT GUIDEWAY improvements and facilities designed, constructed, and installed as a permitted joint use encroachment within HIGHWAY RIGHTS-OF-WAY are to be owned, controlled, protected, operated and maintained solely by MTS. STATE has no duty, obligation or responsibility for the BRT GUIDEWAY or its operation, maintenance or protection, which STATE has permitted to be constructed and operated on HIGHWAY RIGHTS-OF-WAY.
- 35. All BRT GUIDEWAY facilities designed, constructed and installed within STATE HIGHWAY RIGHTS-OF-WAY are to be owned and controlled solely by MTS and operated and maintained by MTS or its contractor. STATE has no duty, obligation or responsibility for the BRT GUIDEWAY or its operation, which STATE has permitted on STATE HIGHWAY RIGHTS-OF-WAY. As identified in Section 670, et seq., of the Streets and Highways Code, any encroachment permit issued to a permittee shall contain a provision that in the event the future improvement of the State highway necessitates the relocation or removal of such encroachment, the permittee will relocate or remove the same at the permittee's sole expense. STATE may choose to waive the requirement that the permittee bear the sole expense and will determine the extent to which this requirement may be waived, if at all.
- 36. For the purpose of this Agreement, maintenance of the areas described herein shall be limited to the preservation and keeping of rights of way, and each type of roadway, structure, and facility, planting and or landscaping, drainage, fencing, removal of graffiti or safety conveniences or devices, signs, illuminating equipment, or other facilities, and the removal of debris. Maintenance shall also be defined as special or emergency maintenance or repair necessitated by accidents or by storms or other weather conditions, slides, settlements, or other unusual or unexpected damage to a roadway, structure or facility. For maintenance or repair in excess of removal of graffiti or covering over the structure, separate right of entry permits shall be required prior to commencing the work. Permits shall be subject to the conditions, review and approval of the issuing agency and approval shall not be unreasonably withheld.
- 37. Neither STATE nor any officer or employee thereof is responsible for any damage or

liability occurring by reason of anything done or omitted to be done by MTS or SANDAG under or in connection with any work, authority, or jurisdiction delegated to MTS or SANDAG under this Agreement. It is understood and agreed that, pursuant to California Government Code Section 895.4, MTS or SANDAG, as applicable, shall fully defend, indemnify, and save harmless STATE, all officers and employees from all claims, suits, or actions of every name, kind, and description brought for or on account of injury (as defined in California Government Code Section 810.8) occurring by reason of anything done or omitted to be done by MTS or SANDAG under in connection with any work, authority, or jurisdiction delegated to MTS or SANDAG under this JU&MA.

- 38. Neither MTS, nor any director, officer, or employee thereof, is responsible for any damage or liability occurring by reason of anything done or omitted to be done by STATE or SANDAG under or in connection with any work, authority, or jurisdiction delegated to STATE or SANDAG under this Agreement. It is also understood and agreed that, pursuant to California Government Code Section 895.4, STATE or SANDAG, as applicable, shall fully defend, indemnify, and save harmless MTS, its directors, officers, and employees from all claims, suits, or actions of every name, kind, and description brought for or on account of injury (as defined in California Government Code Section 810.8) occurring by reason of anything done or omitted to be done by STATE or SANDAG under or in connection with any work, authority, or jurisdiction delegated to STATE or SANDAG under this JU&MA.
- 39. Neither SANDAG, nor any director, officer, or employee thereof, is responsible for any damage or liability occurring by reason of anything done or omitted to be done by STATE or MTS under or in connection with any work, authority, or jurisdiction delegated to STATE or MTS under this Agreement. It is also understood and agreed that, pursuant to California Government Code Section 895.4, STATE or MTS, as applicable, shall fully defend, indemnify, and save harmless SANDAG, its directors, officers, and employees from all claims, suits, or actions of every name, kind, and description brought for or on account of injury (as defined in California Government Code Section 810.8) occurring by reason of anything done or omitted to be done by STATE or MTS under or in connection with any work, authority, or jurisdiction delegated to STATE or MTS under this JU&MA.
- 40. This Agreement shall be effective upon completion of BRT GUIDEWAY and the date of execution of the Joint Use and Maintenance Agreement by MTS, SANDAG and STATE. No funding is allocated or encumbered by STATE relative to this Agreement and all STATE obligations are subject to the passage of an annual State Budget Act and the encumbrance or allocations of funds to this work. Each party will pay its costs of allocated maintenance responsibility as identified herein and no payments are due to either STATE, SANDAG or MTS by the other, except as noted in this agreement. This JU&MA shall remain in effect unless and until it is amended in writing by mutual consent of the parties.
- 41. SANDAG and MTS acknowledges that the permitted joint use of HIGHWAY RIGHTS-OF-WAY without charge is subject to approval by the California Transportation

- Commission and if located on property acquired with federal funds, the U.S. Secretary of Transportation.
- 42. All obligations of MTS under the terms of this JU&MA are subject to the Mills-Deddeh Transit Development Act (Public Utilities Code Section 120000 et seq.).
- 43. Nothing in the provisions of this Agreement is intended to create duties or obligations to or rights in third parties not parties to this contract or affect the legal liability or either party to the contract by imposing any standard of care respecting the maintenance of STATE highways different from the standard of care imposed by law.
- 44. The agreement of MTS to remove or relocate the BRT GUIDEWAY pursuant to the terms of this JU&MA and any waiver by STATE of the duty on the part of MTS to perform that removal or relocation will not be considered as precedent relative to another operational facility owned by MTS outside of the specific HIGHWAY RIGHTS-OF-WAY as defined in this JU&MA.
- 45. MTS shall not permit or allow third parties to place in HIGHWAY RIGHTS-OF-WAY (as defined in this JU&MA) any third party facilities not intended for MTS's sole use, except as may have been expressly permitted or may be permitted in the future by separate agreement(s).
- 46. The parties hereto recognize and agree that separate counterpart signature pages may be used but that all such pages constitute one and the same JU&MA.

# STATE OF CALIFORNIA Department of Transportation

MALCOLM DOUGHERTY Director of Transportation

By //

LAURIE BERMAN District 11 Director

Approved as to form and Procedure:

By Glenn B. Mueller

**Assistant Chief Counsel** 

Department of Transportation

SAN DIEGO METROPOLITAN TRANSIT SYSTEM

By

PAUL C. JABLONSKI Chief Executive Officer

Approved as to form:

By

Karen Landers General Counsel

SAN DIEGO ASSOCIATION OF GOVERNMENTS

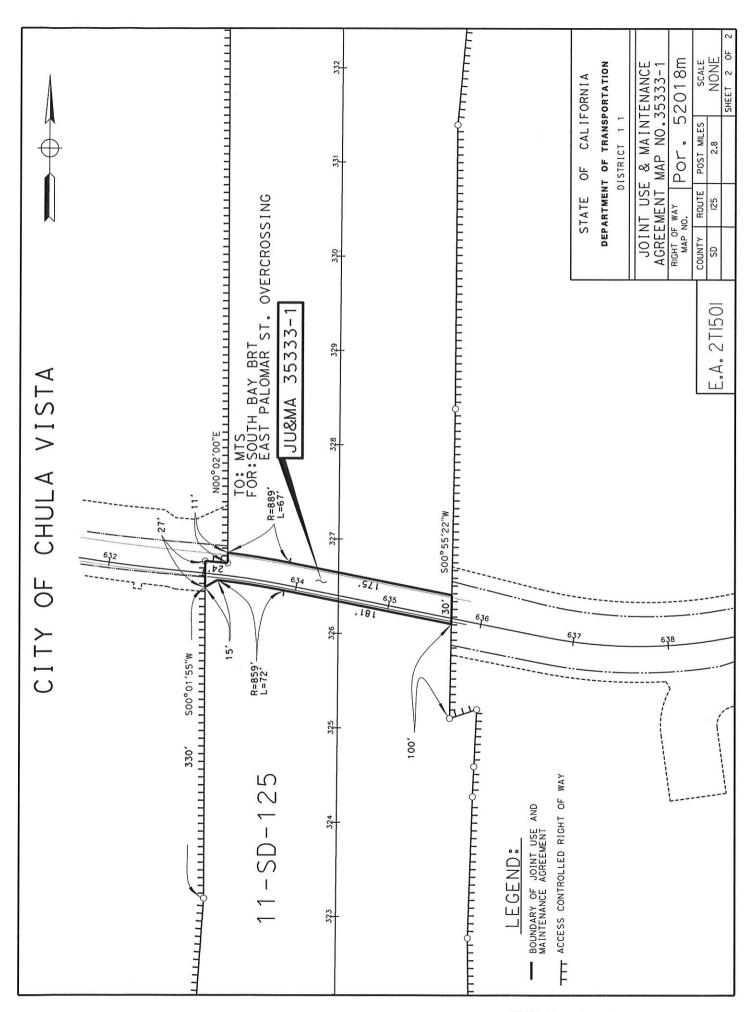
Ву

GARY GALLEGOS
Executive Director

By

Office of General Counsel

## **Exhibit A**



## **Exhibit B**

SANDAG CONTRACT NO. 5000932
DRAWING NO. SHEET NO. 0 2014 JOINT USE & MAINTENANCE AGREEMENT EXHIBITS MAYASSOCIATION OF GOVERNMENTS TITLE SHEET San Diego Association of Governments
GLAB1
401 B STREET, SUITE 800, SAN DIEGO, CA 92101-4231(619) 699-1900
SDAN4 SAN DIEGO EXHIBITS SANDAG SOUTH BAY BRT CALTRANS TO MAINTAIN WITHIN CALTRANS R/W MTS TO MAINTAIN WITHIN CITY RIGHT OF WAY MTS TO MAINTAIN WITHIN CALTRANS R/W DESIGNED BY CHECKED BY JU&MA DRAWN BY RELATIVE BORDER SCALE IS IN INCHES MTS Doc. No. G1842.0-16 3JBAT-PEN-TABLE

