THIS PRINT COVERS CALENDAR ITEM NO. 10.8

SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY

DIVISION: Finance and Information Technology

BRIEF DESCRIPTION:

Approve a Gift Agreement with the San Francisco Parks Alliance for the donation of children's play structure and landscaping improvements in an existing play area at the Woods Maintenance Facility.

SUMMARY:

- The San Francisco Parks Alliance (SFPA) and the Dogpatch Playground Working Group (DPWG), an unincorporated association comprised of Dogpatch neighborhood residents, are interested in facilitating the installation of play area and landscaping improvements at the Woods Maintenance Facility (Playground Improvements).
- The Playground Improvements would create an amenity for children in the Dogpatch neighborhood and meet the request of several interested citizen stakeholders.
- The Gift Agreement would allow SFMTA to accept the installed Playground Improvements and to accept future donations from SFPA for non-routine maintenance of the Playground Improvements, and requires SFMTA to perform routine maintenance for the Playground Improvements and to allow the public to access the Playground Improvements for period of time that would not exceed the nine-year anniversary of the full execution of the Gift Agreement.
- SFPA and DPWG believe they have raised sufficient funds for the Playground Improvements, and with the construction drawings prepared by a design firm, are ready to hire a contractor to install the Playground Improvements.

ENCLOSURES:

- 1. SFMTA Board Resolution
- 2. Woods Facility Mini Playground Gift Agreement

APPROVALS:	DATE
DIRECTOR	_3/20/14
SECRETARY	_3/20/14

ASSIGNED MTAB CALENDAR DATE: April 1, 2014

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PURPOSE

Approve a Gift Agreement for the donation of a children's play structure and landscaping improvements for an existing play area at the Woods Maintenance Facility.

GOAL

This item, by providing a new neighborhood amenity for residents in the Dogpatch neighborhood surrounding several SFMTA facilities, meets the following goals and objectives of the SFMTA Fiscal Year 2013-2018 Strategic Plan:

- Goal 3: Improve the environment and quality of life in San Francisco; Objective 3.3: Allocate capital resources effectively.
- Goal 4: Create a workplace the delivers outstanding service; Objective 4.4: Improve relationships and partnerships with our stakeholders.

BACKGROUND

The Woods Maintenance Facility is located at the corner of 22nd and Indiana Streets (Exhibit A of the Gift Agreement), and serves as a major motor coach operations and maintenance facility under the jurisdiction of SFMTA. At the time of development of the Woods Maintenance Facility, a small park area was constructed along the 22nd Street frontage between Minnesota and Indiana Streets. It is currently used by Dogpatch neighborhood residents as a small dog park and children's play area. In the center of the space is a sand play area measuring approximately 30 feet by 30 feet. The SFPA and the DPWG propose to donate children's play equipment in this sand area to create a tot-lot in this underused space, and to install new landscaping on either side of this sand area. DPWG, SFPA, and SFMTA staff agrees that a formal tot-lot would be an improved use of the existing sand lot space.

The project was conceived in the fall in 2012 by a group of Dogpatch neighbors with young children who envisioned this site as a fun, safe place for their children to play. Significant residential and commercial development over the past few years has resulted in an increase to the neighborhood's population without an accompanying increase in recreational space. SFMTA is in a unique position to provide a neighborhood play space at the Woods facility to help satisfy some of this need. To show support for the project and to seed the fundraising effort, District 10 Supervisor Malia Cohen granted \$20,000 to the project. To their tremendous credit, DPWG has leveraged this seed capital, and conducted a neighborhood outreach and fundraising process that has made this project feasible. DPWG facilitated three community meetings in 2013 to discuss design of the space, and held two community events to raise awareness and funding for the project. Their most recent fundraiser drew over 50 attendees and resulted in over \$20,000.

Throughout 2013 and into the early months of 2014, SFPA and DPWG have partnered to raise the required \$115,000 for the proposed improvements. SFPA, acting as fiscal sponsor, has secured all of these funds, and has the funds at its disposal for construction of the improvements. If the Gift Agreement is approved, SFPA will enter into a license agreement with SFMTA for the installation of the proposed improvements (License Agreement). Under the

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License Agreement, SFPA would be responsible for obtaining approval from the Mayor's Office of Disability and all regulatory approvals necessary for the installation of the playground and landscaping improvements (Playground Improvements) at the Woods facility and to install the Playground Improvements in compliance with the terms and conditions of the Gift Agreement and the License Agreement.

As property owner, SFMTA proposes to provide routine maintenance of the Playground Improvements, which it currently does for the existing site, but SFMTA's routine maintenance obligations would be capped at \$15,000 per each fiscal year. This would be an added maintenance obligation that is somewhat of a departure from current SFMTA maintenance activity, as there are not currently any other children's play structures in the SFMTA maintenance portfolio. If and when repair or replacement of playground features that is above and beyond routine maintenance is required, SFPA and the DPWG have agreed to pay for required and mutually-acceptable upgrades and improvements. The use of the site as a tot-lot is compatible with the SFMTA's continuing use of the Woods facility, and the tot-lot does not pose a safety risk to children resulting from transit operations at the Woods facility.

California Environmental Quality Act

The Municipal Transportation Agency, under authority delegated by the Planning Department, has determined that the proposed Gift Agreement is statutorily exempt from environmental review under California Public Resources Code section 21080(b)(8) and the CEQA implementing guidelines because the project scope involves replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity. The Municipal Transportation Agency's determination is on file with the Secretary to the SFMTA Board of Directors. The proposed action is the Approval Action as defined by the S. F. Administrative Code Chapter 31.

ALTERNATIVES CONSIDERED

The following alternatives were considered for this site:

1) Leave this portion of the Woods Facility as is: no added expense, no changes in current condition. The anticipated result of this inaction would be dissatisfied neighbors and negative community perception.

2) Redevelop the whole park site on the 22nd Street frontage of the Woods Facility. This would be a large up-front expense that is beyond the scope and capacity of the partnership with the SFPA and DPWG. In addition, SFMTA would need to evaluate this project for service interruption at Woods Facility.

As a result of the aforementioned concerns with these alternatives, staff proposes to begin with construction of the tot-lot area and surrounding landscaping, which meets the neighborhood's main goal of having a safe place for kids to play.

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FUNDING IMPACT

Per the terms of the Gift Agreement, the SFMTA is committing to providing routine maintenance in the amount of \$15,000 annually. Staff estimates that the cost of maintaining the proposed Playground Improvements would not be significantly different from the existing cost to maintain the area. Thus, there would be no measurable impact to the operating budget as a result.

OTHER APPROVALS RECEIVED OR STILL REQUIRED

The City Attorney has reviewed this Calendar Item. The project would need to secure all other required regulatory permits and approvals under the attached Gift Agreement and the future License Agreement.

RECOMMENDATION

The SFMTA requests the Board of Directors to approve a Gift Agreement with the San Francisco Parks Alliance to install a children's play structure and landscaping improvements in an existing play area at the Woods Maintenance Facility.

MUNICIPAL TRANSPORTATION AGENCY BOARD OF DIRECTORS CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION No.

WHEREAS, The City and County of San Francisco owns certain real property at the corner of 22nd and Indiana Streets, commonly known as Assessor's Block 4170, Lot 001, which serves as a major operations and maintenance facility for the Woods Motor Coach Division and which is under the jurisdiction of the SFMTA; and

WHEREAS, The San Francisco Parks Alliance (SFPA) and the Dogpatch Playground Working Group (DPWG), an unincorporated association comprised of Dogpatch neighborhood residents, are interested in facilitating the installation of the play area and landscaping improvements (Playground Improvements) on a portion of site (License Area) and, if installed, making a gift of the installed Playground Improvements to SFMTA, and facilitating the maintenance of the Playground Improvements at the License Area for a specified period; and

WHEREAS, The Playground Improvements would create a play space in an area that lacks such amenities and would be a beneficial addition to the overall Dogpatch neighborhood that furthers SFMTA's Strategic Plan Goal 3 to improve the environment and quality of life in San Francisco; and

WHEREAS, DPWG has sponsored fundraising efforts, resulting in funds above and beyond the anticipated installation budget, with SFPA acting as the fiscal sponsor holding donated funds in a special fund; and

WHEREAS, The Gift Agreement specifies the respective responsibilities and conditions for the installation and donation of the Playground Improvements on the License Area, the acceptance of the Playground Improvements, and the maintenance of the Playground Improvements; and

WHEREAS, Installation of the Project Improvements is categorically exempt under the California Environmental Quality Act (CEQA) Guidelines Section 15302 Class 2(C); now, therefore be it

RESOLVED, That the SFMTA Board of Directors approves the Woods Facility Mini Playground Gift Agreement with the San Francisco Parks Alliance to donate a children's play structure and landscaping improvements in an existing play area at the Woods Maintenance Facility.

I certify that the foregoing resolution was adopted by the San Francisco Municipal Transportation Agency Board of Directors at its meeting April 1, 2014.

Enclosure 2

WOODS FACILITY MINI PLAYGROUND GIFT AGREEMENT

THIS WOODS FACILITY MINI PLAYGROUND GIFT AGREEMENT (this "Agreement"), dated as of April _____, 2014, is by and among the City and County of San Francisco, a municipal corporation ("City"), acting by and through the San Francisco Municipal Transportation Agency ("SFMTA"), and the San Francisco Parks Alliance, a California non-profit public benefit corporation ("SFPA"). City and SFPA may each be referred to from time to time as a "Party" and collectively as the "Parties".

RECITALS

A. City owns that certain real property at the corner of 22nd and Indiana Streets, commonly known as Assessor's Block 4170, Lot 001 and depicted on the attached <u>Exhibit A</u> (the "**City Property**"), which serves as a major operations and maintenance facility for the Woods Motor Coach Division and is under the jurisdiction of SFMTA.

B. SFPA and the Dogpatch Neighborhood Working Group ("**DPWG**"), an unincorporated association comprised of Dogpatch neighborhood residents, are interested in facilitating the installation of the play area and landscaping improvements depicted in the attached <u>Exhibit B</u> (the "**Playground Improvements**") on the portion of the City Property depicted on the attached <u>Exhibit A</u> (the "**License Area**") and, if installed, the maintenance of the Playground Improvements at the License Area for a specified period.

C. SFPA wishes to install the Playground Improvements on the License Area pursuant to a temporary license in the form attached to this Agreement as <u>Exhibit C</u> (the "**License Agreement**"), and to make a gift of the installed Playground Improvements to SFMTA.

D. DPWG anticipates that the cost of installing the Playground Improvements (the "**Installation Costs**") will be \$113,000 (the "**Installation Amount**"), and through DPWG's community fund raising efforts for the Installation Costs, with SFPA holding the donated funds as its fiscal sponsor, DPWG has raised the Installation Amount as of the date of this Agreement, with funding commitments for additional amounts pledged from residents and businesses. If the Playground Improvements are installed in the License Area pursuant to this Agreement and the License Agreement, DPWG plans to continue its community fund raising efforts to pay for certain Playground Improvement maintenance costs, with SFPA acting as the fiscal sponsor holding any donated funds in a special maintenance fund.

E. The Playground Improvements would create a play space in an area that lacks such amenities and would be a beneficial addition to the overall Dogpatch neighborhood that furthers SFMTA's Strategic Plan Goal 3 to improve the environment and quality of life in San Francisco.

F. SFMTA is willing to allow SFPA to install, and to accept, the Playground Improvements if SFPA duly executes and delivers the License Agreement to SFMTA, has a mutually-agreeable contractor and construction contract for the installation of the Playground Improvements in compliance with the terms and conditions of this Agreement, and installs the Playground Improvements in compliance with the terms and conditions of this Agreement and the License Agreement.

G. This Agreement specifies the respective responsibilities and conditions for the installation and donation of the Playground Improvements on the License Area, the acceptance of the Playground Improvements, and the maintenance of the Playground Improvements.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, City and SFPA hereby agree as follows:

1. <u>Recitals</u>. The recitals above are true and correct and are incorporated herein by this reference.

2. <u>Effective Date; Term</u>. The term of this Agreement shall commence as of the date (the "**Effective Date**") that each of the following conditions is met: (i) this Agreement has been fully executed, and (ii) SFMTA's Board of Directors has adopted a resolution approving the execution of this Agreement and the acceptance of the Playground Improvements if installed pursuant to the terms of this Agreement. This Agreement shall terminate on the ninth (9th) anniversary of the Effective Date or any earlier date that this Agreement terminates pursuant to its terms ("**Termination Date**").

3. <u>Contractor and Construction Contract</u>.

(a) <u>Contractor Approval Process</u>. The "**Installation Work**" means the installation of the Playground Improvements in the License Area in compliance with the terms and conditions of this Agreement and the License Agreement, and a "**Contractor**" means a contractor duly licensed by the State of California to perform the Installation Work. Within ninety (90) days following the Effective Date, SFPA shall deliver a copy of its proposed Contractor's construction bid for the Installation Work to SFMTA for review. If SFMTA does not notify SFPA in writing of its disapproval of SFPA's proposed Contractor or its bid within ten (10) business days of receiving SFPA's proposed Contractor bid, and such bid is for no more than the Installation Amount, SFMTA shall be deemed to have approved of SFPA's proposed Contractor and its bid.

If the amount of SFPA's proposed Contractor's bid for the Installation Work is higher than the Installation Amount (an "**Excess Bid**"), during the thirty (30) day period immediately following SFPA's delivery of such Excess Bid to SFMTA, SFPA shall use good faith efforts to raise funds for the amount by which the Excess Bid exceeds the Installation Amount. At the end of such thirty (30) day period, SFPA shall deliver written notice to SFMTA of the amount of Playground Improvement funds held by SFPA as of such date (the "**Updated Installation Amount**"). If the Updated Installation Amount is equal to or more than the Excess Bid, and SFMTA does not notify SFPA in writing of its disapproval of SFPA's proposed Contractor or the Excess Bid within ten (10) business days of receiving SFPA's written notice of the Updated Installation Amount, SFMTA shall be deemed to have approved of SFPA's proposed Contractor and its Excess Bid.

If the Updated Installation Amount is less than the Excess Bid, SFPA may submit for SFMTA's approval a reduced construction bid from its proposed Contractor that removes elements of the Playground Improvements and is for no more than the Updated Installation Amount, which approval shall not be unreasonably withheld or conditioned. If SFMTA does not notify SFPA in writing of its disapproval of the proposed Contractor or its reduced construction bid within ten (10) business days of receiving SFPA's written notice of the Updated Installation Amount, SFMTA shall be deemed to have approved of SFPA's proposed Contractor and the reduced bid.

Any Contractor approved by SFMTA pursuant to this Section shall be an "**Approved** Contractor".

Construction Contract. Prior to commencing any of the Installation Work, SFPA (b) shall deliver a fully executed copy of Approved Contractor's construction contract (the "Proposed Contract") for the Installation Work to SFMTA for approval, which approval shall not be unreasonably withheld or conditioned. The Proposed Contract shall include Contractor's agreement to (i) indemnify the City, including SFMTA, for all claims arising from the use of the License Area, or the performance of any of the Installation Work, by Contractor or its employees, subcontractors, agents, representatives, or principals, (ii) name City, including SFMTA, as a third-party beneficiary, including, without limitation, of all warranties of the work and of all required performance bonds related to Contractor's performance of the Installation Work, (iii) pay its workers performing any of the Installation Work the prevailing rate of wage for the craft or classification of work performed, (iv) carry performance and payment bonds for the performance of the Installation Work described in such agreement, identifying SFPA and the SFMTA as joint obligees, (v) includes the non-discrimination language required under Section 11(b), and (vi) acknowledges that City shall have no obligation to reimburse or pay Contractor for the Playground Improvements or the performance of the Installation Work. SFPA will be fully responsible for all payments to Approved Contractor and any subcontractors performing any of the Installation Work at no cost to SFMTA, and shall provide evidence satisfactory to SFMTA that the Approved Contractor and all subcontractors performing any of the Installation Work all acknowledge that SFMTA is not financially liable for any payment of, and shall not be invoiced for, the Playground Improvements or any costs incurred by such party in performing the Installation Work.

If SFMTA does not notify SFPA in writing of SFMTA's disapproval of a Proposed Contract within ten (10) business days of receiving the Proposed Contract from SFPA, SFMTA shall be deemed to have approved of the Proposed Contract. Any Proposed Contract approved by SFMTA shall be the "**Approved Contract**".

(c) <u>Approval Date and Contract Date</u>. The date that SFMTA approves of an Approved Contractor shall be the "**Approval Date**", and the date that SFMTA approves of a Proposed Contract shall be the "**Contract Date**". If either the Approval Date or the Contract Date does not occur within the one hundred twenty (120) day period immediately following the Effective Date, SFMTA shall have the right to terminate this Agreement on delivering written notice of such termination to SFPA.

4. <u>Installation Work</u>.

(a) <u>Outside Installation Date</u>. SFPA shall cause the Installation Work to be completed in compliance with the Approved Contract on or before the 180th day immediately following the Effective Date.

(b) <u>Regulatory Approvals</u>. Prior to commencing any of the Installation Work, SFPA shall obtain, at its sole costs, all regulatory authorizations, permits, and approvals required for any of the Installation Work by any local, state, or federal governmental agency having jurisdiction thereto, including, but not limited to, any that may be required by City's Department of Building Inspection, City's Planning Department, and City's Art Commission. SFPA shall also obtain approval of City's Mayor's Office on Disability to the Installation Work. SFPA acknowledges that City is entering into this Agreement as a landowner with a proprietary interest in the License Area, and not as a regulatory agency with police powers, and City makes no representations regarding any such authorizations, permits, or approvals that may be required for the Installation Work. Accordingly, there is no guarantee, nor a presumption, that any of the

regulatory approvals required for the approval or performance of the Installation Work will be issued by the appropriate regulatory agency, and City's status as a regulatory agency shall in no way limit the obligation of SFPA, at its own cost and initiative, to obtain approvals from any regulatory agencies which have jurisdiction over any of the Installation Work. Without limiting the foregoing, SFPA understands and agrees that City staff have no obligation to advocate, promote or lobby any regulatory agency and/or any City official for any regulatory approval or for approval of the Installation Work, and any such advocacy, promotion or lobbying shall be done by SFPA at its sole cost and expense

(c) <u>Oversight</u>. Following the commencement of the Installation Work by the Approved Contractor, SFPA shall use reasonable efforts to conduct or cause to be conducted periodic on-site construction inspections at the License Area to ensure that Approved Contractor and its subcontractors, if any, are performing the Installation Work in accordance with the Approved Contract and any plans and specifications therefor approved by SFMTA pursuant to the License Agreement and in compliance with the terms of the License Agreement. SFMTA may, at its sole discretion, review or observe the performance of the Installation Work.

(d) <u>Work Stoppage</u>. If, following the commencement of the Installation Work, there is any stoppage in the performance of the Installation Work for more than ten (10) consecutive business days, SFPA shall, in consultation with SFMTA, take all reasonable steps to cure such stoppage, which may include, without limitation, contracting for performance of necessary services from another contractor. If for any reason the Installation Work cannot or is not fully executed to completion in accordance with the approved plans and specifications, SFPA shall restore the License Area to the condition it was in as of the Effective Date, as further set forth in the License Agreement, or in any other condition mutually approved by the Parties in writing.

Notice of Completion; Acceptance. SFPA shall deliver written notice to SFMTA of its 5. completion of the Installation Work, together with the following: (i) a complete set of final asbuilt plans and specifications for the installed Playground Improvements in an electronic format reasonably acceptable to SFMTA, (ii) evidence of SFPA's purchase, with no outstanding liens or claims, of the Playground Improvements and SFPA's receipt of approval from City's Mayor's Office on Disability and all necessary regulatory approvals for the performance of any of the Installation Work, (iii) copies of any warranties provided for the Playground Improvements, (iv) SFPA's assignment to SFMTA of all warranties and any rights SFPA may have as against third parties with respect to any defects in design, manufacture, or construction of the Playground Improvements and Installation Work, and (v) a release of any liens or claims for the payment of the Installation Work from Contractor and any subcontractor that performed any of the Installation Work. Within ten (10) business days of SFMTA's receipt of such items, SFMTA shall inspect the Installation Work in its proprietary capacity as owner of the License Area and deliver to SFPA written notice of its acceptance or rejection of the Installation Work, which acceptance shall not be unreasonably withheld. The date, if any, that SFMTA delivers its written acceptance of the Playground Improvements installed through Installation Work to SFPA pursuant to this subsection, shall be the "Acceptance Date". Commencing on the Acceptance Date, all references to the Playground Improvements in this Agreement shall mean the Playground Improvements installed at the License Area pursuant to the Installation Work on the Acceptance Date.

6. <u>Routine Maintenance; Public Access</u>.

(a) <u>Performance of Routine Maintenance</u>. If SFMTA accepts the Playground Improvements pursuant to <u>Section 5</u>, during the period (the "**Public Use Period**") that commences on the Acceptance Date and terminates on the Termination Date, SFMTA shall perform the Routine Maintenance (as defined below) subject to the funding limits described in <u>Section 6(b)</u>. After the Public Use Period terminates, SFMTA shall have no further obligations to perform Routine Maintenance or to maintain or keep the Playground Improvements, and shall have the right, in its sole discretion, to alter, remove, modify, or dispose of the Playground Improvements. "**Routine Maintenance**" shall mean the following activities within the License Area:

- (i) daily sweeping;
- (ii) removal of graffiti from sidewalks and the Playground Improvements as needed;
- (iii) annual inspection of the Playground Improvements for structural integrity and proper anchoring to surface areas;
- (iv) monthly inspection of Playground Improvements for any cracking, rust, or splinters, and for the bubbling, cracking, or fading of any painted surface;
- (v) annual stripping, re-painting, and touch-up of any painted or finished surfaces;
- (vi) annual inspection of surface areas for gaps, settling, and non-level transition areas;
- (viii) monthly inspection of mulch/fiber, gravel, sand, and loose synthetic features to remove debris and sharp objects, and annual replenishment of such mulch/fiber, gravel, sand, and loose synthetic features as needed;
- (ix) maintenance of landscaping; and
- (x) annual patching of any damage to the protective coating on the retaining walls at the Playground.

(b) <u>Routine Maintenance in Excess of Annual Maintenance Limit</u>. SFMTA's obligations to perform the Routine Maintenance shall not exceed \$15,000 per each SFMTA fiscal year during the Public Use Period (the "**Annual Maintenance Limit**"). If there is a partial SFMTA fiscal year during the Public Use Period, the Annual Maintenance Limit for such partial SFMTA fiscal year shall be prorated, based on a 365-day fiscal year. Once SFMTA spends up to the Annual Maintenance Limit in performing any Routine Maintenance during any SFMTA fiscal year during the Public Use Period (or the prorated Annual Maintenance Limit for any partial SFMTA fiscal year), SFMTA shall send a written notice to SFPA documenting its performed Routine Maintenance expenses for such SFMTA fiscal year in reasonable detail, and upon delivery of such notice, SFMTA shall have no obligation to perform any Routine Maintenance during the remainder of such SFMTA fiscal year.

(c) <u>Public Access</u>. During the Public Access Period, SFMTA shall allow public access to the Playground Improvements during daylight hours; provided, however, that SFMTA shall have the right to temporarily prevent such public access (i) when SFMTA is performing any Routine Maintenance or any Approved Repair Item (as defined in <u>Section 7</u>) or performing any other maintenance, repair, or replacement of the Playground Improvements that SFMTA elects to perform, (ii) as reasonably needed to protect public health and safety with respect to its activities on the remainder of the City Property, or (iii) as reasonably needed in performing its reserved rights under this Agreement. SFMTA reserves the right to install, or to allow third parties to install, any items in the License Area that do not interfere with the use of the Playground Improvements, except to the extent such interference is reasonably required for the installation, maintenance, repair, or replacement of such other items. After the termination of the Public Use Period, SFMTA shall have no further obligations to provide public access to the Playground Improvements or the License Area.

7. <u>Non-Routine Maintenance</u>.

(a) <u>Identification and Approval</u>. Any repair, replacement, or upgrade to the Playground Improvements during the Public Use Period that is not Routine Maintenance shall be a "**Non-Routine Maintenance Item**". Non-Routine Maintenance Items, include, but are not limited to, the following: (i) replacement or repair of any Playground Improvement that is substantially damaged or degraded, including any patching of a large portion of the rubberized surface covering installed as part of the Installation Work; (ii) the purchase of any maintenance equipment that would only be used on the Playground Improvements and not at any other SFMTA facilities or property; and (iii) redesign services to accommodate substantial changes to the License Area or the surrounding area after the Acceptance Date.

At least thirty (30) days prior to the start of each SFMTA fiscal year, SFMTA and SFPA will discuss any proposed Non-Routine Maintenance Items that either Party suggests for an upcoming SFMTA fiscal year to improve the safety, use, or enjoyment of the Playground Improvements, and the availability of Special Maintenance Fund moneys to pay for such proposals. If either Party identifies any Non-Routine Maintenance Item that would improve the safety, use, or enjoyment of the Playground Improvements at any other time, such Party may deliver written notice to the other Party of such identified Non-Routine Maintenance Item (a "**Proposed Maintenance Notice**"). The responding Party will have thirty (30) days to notify the initiating Party in writing if the responding Party agrees to such proposed Non-Routine Maintenance Notice, it may condition its approval of the Non-Routine Maintenance Item(s) described in SFPA's Proposed Maintenance Notice on SFPA's donation of moneys from the Special Maintenance Item(s).

An "**Approved Repair Item**" means a Non-Routine Maintenance Item that (i) the Parties mutually agree to have SFMTA perform in writing, and (ii) will be fully funded from the Special Maintenance Fund or, if there are insufficient Special Maintenance Fund moneys to pay for such Non-Routine Maintenance Item, will be funded with other funds mutually acceptable to SFPA and SFMTA. If SFPA delivers moneys from the Special Maintenance Fund in an amount equal the estimated cost for an Approved Repair Item to SFMTA, SFMTA shall cause such Approved Repair Item to be performed in a timely manner. If SFPA delivers any Special Maintenance Fund moneys to SFMTA for the performance of an Approved Repair Item, SFMTA shall only use the delivered moneys for such purposes. If SFMTA's actual cost for causing the performance of such Approved Repair Item is less than the Special Maintenance Fund moneys delivered to SFMTA for such Approved Repair Item, SFMTA shall promptly return such excess moneys to the Special Maintenance Fund.

(b) <u>Special Maintenance Fund</u>.

(i) SFPA shall maintain all funds donated to DPWG for the maintenance of the Playground Improvements in a fund exclusively dedicated to funding Approved Repair Items or funding Routine Maintenance that SFMTA is not obligated to perform pursuant to <u>Section</u> <u>6(b)</u> ("**Special Maintenance Fund**"). At least thirty (30) days prior to the start of each SFMTA fiscal year during the Public Use Period, SFPA will provide a written update to SFMTA of the Special Maintenance Fund balance and any anticipated contributions or balances for the upcoming year. Funds may be disbursed from the Special Maintenance Fund only to pay for Approved Repair Items or any Routine Maintenance that SFMTA is not obligated to perform pursuant to <u>Section 6(b)</u>, to the extent that SFPA approves of the use of the Special Maintenance Fund does not contain sufficient funds to pay for a Non-Routine Maintenance Item that the Parties have mutually agreed to have SFMTA perform in accordance with the foregoing subsection, the Parties may identify other mutually-agreeable funds to supplement the payment of such Non-Routine Maintenance Item.

(ii) SFPA shall keep regular records of the Special Maintenance Fund. From time to time, upon request by SFMTA, SFPA shall provide a statement of the then-current balance of the Special Maintenance Fund, and all debits and credits thereto. On the termination of the Public Use Period, or any earlier termination of this Agreement, SFPA will provide a full accounting of the Special Maintenance Fund and all debits and credits thereto for the Public Use Period, and SFMTA shall have no right to the balance of SFPA's Special Maintenance Fund.

(iii) SFPA shall make a good faith effort, within the constraints of fundraising efforts, to maintain a Special Maintenance Fund balance of \$9,000. If SFPA is unable to raise funds to sufficiently maintain an annual balance of \$9,000, SFPA shall provide written notice to SFMTA describing the funding shortfall and describing fundraising strategies.

8. <u>Defaults</u>. If a Party fails to timely perform or comply with its obligations under this Agreement (an "**Event of Default**"), it shall diligently cure such Event of Default within the thirty (30) day period immediately following its receipt of notice of such Event of Default from the other Party; provided, however, that if such matter cannot be reasonably cured within thirty (30) days and the defaulting Party has diligently commenced to cure such matter and pursues such cure to completion, such defaulting Party shall have a reasonable period of time to cure such Event of Default. If there is an Event of Default that is not timely cured by a defaulting Party, the non-defaulting Party shall have the right to seek enforcement of the terms and conditions of this Agreement with respect to such Event of Default, to terminate this Agreement, or to exercise any of its rights or remedies available at law or in equity.

9. <u>Notice</u>. All notices given under this Agreement will be in writing and be given by personal delivery, United States Postal Service, or nationally recognized overnight courier service to the address set forth below, provided that a Party may change the notice addresses set forth below for such Party at any time by written notice of same to the other Party.

If to SFPA:	San Francisco Parks Alliance 451 Hayes Street San Francisco, California 94102 Attention: Matthew O'Grady
With a Copy To:	Brian M. Wong Pillsbury Winthrop Shaw Pittman LLP Four Embarcadero Center, Floor 22 San Francisco, CA 94111
If to SFMTA:	San Francisco Municipal Transportation Agency Finance & Technology Division - Real Estate Section 1 South Van Ness Avenue, 8 th Floor San Francisco, CA 94103 Attn: Senior Manager

10. <u>Assignment; Successors and Assigns</u>. Neither Party's rights and obligations hereunder may be assigned without the prior written consent of the other Party. This Agreement shall be binding upon, and inure to the benefit of, the Parties and their respective successors, heirs, legal representatives, and administrators, and any assigns of a Party approved in writing by the other Party.

11. <u>Non-Discrimination</u>.

(a) In the performance of this Agreement, SFPA agrees not to discriminate against any employee of, any City employee working with SFPA, or applicant for employment with SFPA, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

(b) SFPA shall include in its construction agreement for the Installation Work and all subcontracts relating to the Permit Area a non-discrimination clause applicable to such subcontractor in substantially the form of the foregoing subsection (a). In addition, SFPA shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code and shall require all subcontractors to comply with such provisions. SFPA's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

(c) SFPA does not as of the date of this Agreement and will not during the term of this Agreement, in any of its operations in San Francisco, on real property owned by City, or where the work is being performed for the City or elsewhere within the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in Section 12B.2(b) of the San Francisco Administrative Code.

(d) As a condition to this Agreement, SFPA shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission (the "**HRC**"). SFPA hereby represents that prior to execution of this Agreement, (i) SFPA executed and submitted to the HRC Form HRC-12B-101 with supporting documentation, and (ii) the HRC approved such form.

12. <u>Entire Agreement; Amendments</u>. This Agreement, including all exhibits attached hereto, constitutes the entire agreement between the Parties and supersedes all prior agreements, promises, and understandings, whether oral or written. This Agreement may be amended or modified only by a written instrument signed by SFPA and City.

13. <u>Counterparts</u>. This Agreement may be executed in several counterparts, and/or by the execution of counterpart signature pages that may be attached to one or more counterparts of this Agreement, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

14. <u>Interpretation of Agreement</u>. The article, section and other headings of this Agreement and the table of contents are for convenience of reference only and shall not affect the meaning or interpretation of any provision contained herein. Whenever the context so requires, the use of the singular shall be deemed to include the plural and vice versa, and each gender reference shall be deemed to include the other and the neuter. This Agreement has been negotiated at arm's length and between persons sophisticated and knowledgeable in the matters dealt with herein. In addition, each party has been represented by experienced and knowledgeable legal counsel. Accordingly, any rule of law (including California Civil Code Section 1654) or legal decision that would require interpretation of any ambiguities in this Agreement against the party that has drafted it is not applicable and is waived. The provisions of this Agreement shall be interpreted in a reasonable manner to effect the purposes of the Parties and this Agreement.

15. <u>Attorneys' Fees</u>. If either party hereto fails to perform any of its respective obligations under this Agreement or if any dispute arises between the parties hereto concerning the meaning

or interpretation of any provision of this Agreement, then the defaulting party or the party not prevailing in such dispute, as the case may be, shall pay any and all costs and expenses incurred by the other party on account of such default or in enforcing or establishing its rights hereunder, including, without limitation, court costs and reasonable attorneys' fees and disbursements. For purposes of this Agreement, the reasonable fees of attorneys of the Office of the City Attorney of the City and County of San Francisco shall be based on the fees regularly charged by private attorneys with the equivalent number of years of experience in the subject matter area of the law for which the City Attorney's services were rendered who practice in the City of San Francisco in law firms with approximately the same number of attorneys as employed by the City Attorney's Office.

16. <u>No Waiver</u>. Failure or delay in giving notice of default shall not constitute a waiver of default, no shall it change the time of default. Except as otherwise expressly provided herein, any failure or delay by a Party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies; nor shall it deprive such Party of its right to institute and maintain any actions or proceedings that it may deem necessary to protect, assert, or enforce any such rights or remedies. No Party shall be deemed to have waived any provision of this Agreement unless it does so in writing, and no "course of conduct" shall be considered to be such a waiver, absent such a writing.

17. <u>Governing Law</u>. This Agreement has been executed and delivered in and shall be interpreted, construed, and enforced in accordance with the laws of the State of California. All rights and obligations of the Parties under this Agreement are to be performed in the City and County of San Francisco, and such City and County shall be the venue for any legal action or proceeding that may be brought, or arise out of, in connection with, or by reason of, this Agreement

18. <u>No Third Party Beneficiaries</u>. Nothing in this Agreement, express or implied, is intended to confer any rights or remedies on any person or entity other than the Parties and their respective permitted successors and assigns.

19. <u>Time of Essence</u>. Time is of the essence with respect to the performance of the parties' respective obligations contained herein.

20. <u>Non-Liability of City Officials, Employees and Agents</u>. Notwithstanding anything to the contrary in this Agreement, no elective or appointive board, commission, member, officer, employee or agent of City shall be personally liable to SFPA, its successors and assigns, in the event of any default or breach by City or for any amount which may become due to SFPA, its successors and assigns, or for any obligation of City under this Agreement.

21. <u>Conflicts of Interest</u>. Through its execution of this Agreement, SFPA acknowledges that it is familiar with the provisions of Section 15.103 of City's Charter, Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitute a violation of said provisions and agrees that if it becomes aware of any such fact during the term of this Agreement, SFPA shall immediately notify the City.

22. <u>Sunshine Ordinance</u>. SFPA understands and agrees that under the City's Sunshine Ordinance (San Francisco Administrative Code, Chapter 67) and the State Public Records Law (Gov. Code Section 6250 et seq.), this Agreement and any and all records, information, and materials submitted to the City hereunder may be deemed public records subject to public disclosure. SFPA hereby acknowledges that the City may disclose any records, information and materials submitted to the City in connection with this Agreement. 23. <u>Tropical Hardwood and Virgin Redwood Ban; Arsenic-Treated Wood</u>. City urges companies not to import, purchase, obtain or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product except as expressly permitted by the application of Sections 802(b) and 803(b) of the San Francisco Environment Code. SFPA further agrees that the Playground Improvements shall not include any wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including but not limited to, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative.

24. <u>MacBride Principles</u>. City urges companies doing business in Northern Ireland to move toward resolving employment inequities and encourages them to abide by the MacBride Principles as expressed in San Francisco Administrative Code Section 12F.1 et seq. City also urges companies to do business with corporations that abide by the MacBride Principles. SFPA acknowledges that it has read and understands the above statement of the City concerning doing business in Northern Ireland.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the dates set forth their signatures below.

SFMTA:

CITY AND COUNTY OF SAN FRANCISCO, acting by and through the San Francisco Municipal Transportation Agency

By: _____

Edward D. Reiskin Director of Transportation

Date:

APPROVED BY:

San Francisco Municipal Transportation Agency Board of Directors Resolution No: ______ Adopted: ______ Attest:

Secretary, SFMTA Board of Directors

APPROVED AS TO FORM: DENNIS J. HERRERA, City Attorney

By:

Carol Wong, Deputy City Attorney

SFPA:

SAN FRANCISCO PARKS ALLIANCE, a California non-profit public benefit corporation

By:	
Name:	
Its:	

Date:

Exhibit A

Depiction of City Property and License Area

Depiction of City Property and License Area

Located at the intersection of 22nd and Indiana Streets, and outlined in red below, the City Property is the location of the SFMTA Woods Maintenance Yard, which handles the maintenance of approximately 265 40-foot buses, cable car repair, plus SFMTA's Reserve Fleet as well as overflow from other bus yards, resulting in the aggregate maintenance of 400+ buses and cable cars. The entire City Property occupies the following Block/Lot numbers: Block 4170, Lots 001, 002, 003, 004, 006, 007, 010, and 011, and Block 4171, Lots 011, 021, 022. A map of the City Property is shown below.



The License Area is located on the easterly block of the City Property, along the northern edge of the 22^{nd} Street frontage. The photograph below shows the License Area and the condition in which it is in as of the Effective Date.



<u>Exhibit B</u>

Playground Improvements











