

RESOLUTION NO. 07-182

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EMERYVILLE APPROVING AN AGREEMENT WITH THE EMERYVILLE TRANSPORTATION MANAGEMENT ASSOCIATION (TMA) TO OPERATE THE EMERY GO ROUND SHUTTLE FOR A PERIOD OF TEN YEARS USING FUNDS FROM THE EMERYVILLE PROPERTY-BASED, BUSINESS IMPROVEMENT DISTRICT (PBID) WITH SPECIFIC BUDGET TO BE SET ANNUALLY IN ACCORDANCE WITH THE ADOPTED PBID MANAGEMENT PLAN

WHEREAS, in 2001, the City of Emeryville adopted a Property Based, Business Improvement District (PBID) to fund the Emery Go Round Shuttle after a vote of approval by Emeryville commercial property owners (Resolution No. 01-122); and

WHEREAS, in July 2006, after a vote of approval by Emeryville commercial property owners, the City Council approved the renewal of the PBID for another ten years (Resolution No. 06-141); and

WHEREAS, the Emeryville Transportation Management Association (TMA) is a private, non-profit organization representing the commercial property owners that contribute funds to the PBID; and

WHEREAS, under PBID law, the City is mandated to contract with the TMA, as the owners' representative, to provide services related to the PBID; and

WHEREAS, the Emeryville TMA has successfully administered and operated the Emery Go-Round shuttle for the past nine years, first as a privately funded and operated shuttle system and currently through a service agreement with the City to conduct activities related to the PBID; now, be it

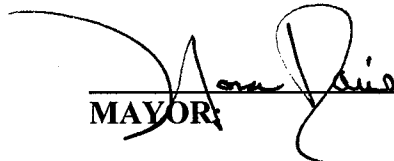
RESOLVED that the City Council of the City of Emeryville hereby approves the attached agreement with the Emeryville Transportation Management Association to operate the Emery Go-Round Shuttle for a period of ten years with the specific yearly budget to be set by annual resolution.


**ADOPTED**, by the City Council of the City of Emeryville at a regular meeting held Tuesday, November 20, 2007 by the following vote:

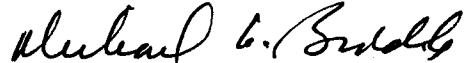
**AYES: (5) Mayor Davis, Vice Mayor Atkin and Councilmembers Bukowski, Fricke & Kassis**

**NOES: (0) None** \_\_\_\_\_ **ABSENT: None** \_\_\_\_\_

**EXCUSED: None** \_\_\_\_\_ **ABSTAINED: None** \_\_\_\_\_

  
\_\_\_\_\_  
**MAYOR:**

**ATTEST:**  
  
\_\_\_\_\_  
**CITY CLERK**

**APPROVED AS TO FORM:**  
  
\_\_\_\_\_  
**CITY ATTORNEY**

# SHUTTLE BUS SERVICE FUNDING AGREEMENT

This Shuttle Bus Funding Agreement (“Agreement”) is entered into effective the 1<sup>st</sup> day of January, 2007, (“Date of Agreement”), by and between the City of Emeryville, a municipal corporation (“CITY”) and the Emeryville Transportation Management Association, a California non-profit public benefit corporation (“TMA”).

## RECITALS

A. TMA operates a shuttle bus service, known as the “Emery Go Round” (“Shuttle”) which primarily provides shuttle service between commercial and industrial sites in the City of Emeryville and the MacArthur BART Station in Oakland.

B. The TMA has successfully operated the Shuttle since 1997. Funding for the shuttle was initially provided by various members of the TMA, some of whose participation in the TMA is as a result of obligations undertaken in separate agreements with CITY or the Emeryville Redevelopment Agency related to the development of their properties.

C. In July, 2001, CITY formed a Property Based Business Improvement District (“PBID”), pursuant to Street and Highways Code Section 36600 *et seq.* to fund the Shuttle and other transportation services. The PBID created a citywide assessment on certain business properties in Emeryville found to receive a special benefit from the service for the purpose of funding the Shuttle and other transportation services, following the approval of the assessment by a majority vote of the affected property owners.

D. In July, 2006, following the submittal of a petition to renew the PBID by business owners and a successful vote to extend it, the City renewed the PBID for a ten-year period.

E. The Parties wish to enter into this Agreement so that CITY can continue to provide the TMA with the funding for the Shuttle in return for TMA operating the Shuttle as contemplated in the PBID Management District Plan and as further provided in this Agreement.

F. The TMA shall operate the Shuttle either by its own forces or through an independent contractor.

## AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, the parties agree as follows:

1. Shuttle Service. TMA will operate the Shuttle based on an annual operating plan and budget established by the TMA Board of Directors ("Board"), in accordance with the "Service Parameters" attached as Exhibit A, and pursuant to a budget approved by Board and City Council. The annual levy shall be set based on the level of service desired by the PBID participants, acting through the TMA Board of Directors.

2. Term. The term of this agreement shall be for ten (10) years, commencing on January 1, 2007 and ending on December 31, 2016 or the effective date of the disestablishment of the PBID, whichever is earlier. This agreement shall become effective upon execution, and shall supersede the April 30, 2002 agreement of the same title with regard to PBID funds collected during the 2006-2007 fiscal year and shall pertain to the operation of and funding for the Shuttle service beginning on January 1, 2007.

3. Payment. CITY receives from Alameda County funds collected as a result of the PBID assessment, as well as direct funds directly from certain PBID members. The funds actually delivered by Alameda County to CITY, PBID assessments collected directly by CITY, mitigation and/or development fees paid directly to the TMA for the specific purpose of funding the shuttle shall be designated herein as the "PBID Funds." Other funds collected by the City or TMA as a result of grants, funds for services or through voluntary participation in other entities shall not be considered "PBID Funds."

TMA will prepare an annual budget (January 1-December 31) for the administration and operation of the Shuttle, which shall be adopted by the TMA Board of Directors and shall be presented by November 15 of each year to the City Council for approval. In conjunction with its annual approval of each year's budget, the City Council shall appropriate the funds for the following calendar year. CITY payments to the TMA of PBID Funds shall be based upon the

annually approved budget, as adjusted for PBID Funds paid directly to the TMA as mitigation and/or developer fees, and such payments shall be remitted to the TMA. CITY shall remit semi-annual installments of the PBID Funds to the TMA, net of deductions for City incurred renewal and administrative costs, as follows: the first installment on January 15th of each year, commencing in 2007, and the second installment on May 15<sup>th</sup> of each year commencing in 2007. The City shall retain the difference between the PBID Funds and the approved annual budget in a designated special account reserved for PBID-related costs. The TMA may request that the City provide additional funds from the designated special account for shuttle-related annual operating and/or capital purchases through the contract amendment process.

The CITY agrees that the annual budget and appropriation for the TMA shall be no less than the annual property and equipment lease payments, , provided that the TMA provide the CITY with copies of all property and equipment leases and that at least this amount is collected in PBID Funds for the duration of the lease obligation. It is understood and agreed that the TMA may receive income from other sources, including payments for non-PBID services it may perform for TMA members or third parties and that this agreement does not affect the manner in which TMA may expend funds from such other sources.

In the event the actual PBID Funds are less than the amount provided for in the approved budget, TMA will/may institute service reductions in a manner consistent with the PBID Management District Plan and subject to the approval of the TMA Board.

#### 4. Customer Service

The TMA shall be responsible for the prompt and courteous attention to, and prompt and reasonable resolution of all customer complaints. The TMA shall respond to all complaints from customers within a reasonable time frame. The TMA shall record all complaints, noting the name and address of complainant, date and time of complaint, nature of complaint, and nature and date of resolution. This complaint log shall be retained by the TMA and information relating to individual complaints should be retained for a period of one (1) year after the date of resolution. Such log shall be kept so that it may conveniently be inspected by representatives of the City upon request. TMA shall not be held responsible for collecting information that is not provided by complaintants.

5. Audit Requirement. For the duration of this Agreement, the TMA shall promptly provide to the City by June 30<sup>th</sup> of each year an audit of the preceding calendar year's -PBID receipts and expenditures in conformity with generally accepted accounting principles from an independent auditor acceptable to City. In addition, the TMA shall provide to the City all records relating to the PBID and the TMA's operation of the Shuttle including, but not limited to, all records of receipts and expenditures. TMA shall have the right to audit City's records regarding the PBID funds.

6. Reporting. On March 31 of each calendar year of this Agreement, TMA shall submit to CITY an annual financial and operations report for the preceding calendar year. The annual report shall include a summary of the information recorded in the customer service log. By May 31<sup>st</sup> of each calendar year TMA shall submit a mid-year financial report with a tentative budget and proposed levy amount for the following year. On November 15 of each year the TMA shall submit a final budget for the following year.

By September 30<sup>th</sup> of each year, CITY shall provide to TMA an annual accounting of all PBID Funds budgeted, actual PBID Funds received and any late fees/penalties related to PBID Funds received by the CITY, any mitigation and/or developer fees or grant funds received by the CITY for the specific purpose of funding the Shuttle, and any expenditures of PBID Funds or other funds related to the operation of the Shuttle, including any PBID assessment that are retained by Alameda County or any amounts expended by CITY during the previous year. This accounting shall include any adjustments made by Alameda County on the basis of actual collection of PBID assessments. In addition, CITY shall provide the current balance of any PBID Funds held by the CITY, any interest credited relative to those funds and any expenditures of those funds.

7. Marketing and Joint Planning Program. TMA shall conduct a marketing program regarding the Shuttle to PBID property owners, which shall include, at a minimum, one annual summary report, to be distributed via U. S. mail or through a newsletter to all property owners participating in the PBID and to CITY and one public meeting, notice of which shall be given to

all PBID property owners. TMA will also provide schedules and notices on buses, as well as maintaining a website and providing liaison to other transit-related agencies.

TMA and City liaisons shall meet at least on an annual basis to jointly collaborate, plan, and implement as part of the annual operating plan, if feasible, a pilot carshare program, customer service and information enhancements, improvements for intermodal connectivity, such as bicycle racks and Nextbus technology, and other transportation services as contemplated in the PBID Management District Plan.

7. City PBID Obligations. CITY shall utilize reasonable efforts to collect all PBID assessments (including those not collected by the County (PG&E, AC Transit, Emeryville Unified School District)). CITY shall also notify TMA of any changes in the identity of property owners or amount of any assessments on PBID properties in May of each year. During the periods in which CITY collects PBID assessments, the obligations of any TMA members to contribute to the TMA that arise pursuant to a development agreement, owner participation agreement, disposition and development agreement, settlement agreement or as a result of any conditions of development approval, shall be satisfied by the payment of the PBID assessment relating to the particular property involved. City shall consult with TMA and shall provide TMA with notice prior to any public hearing it may hold pursuant to Street and Highways Code 36636 relative to a change in PBID Management District Plan.

8. Termination. This Agreement may be terminated by either party only for cause by giving one hundred eighty (180) days prior written notice to the other in the manner provided below. Cause for termination would include, but not be limited to: the failure of CITY to deliver the PBID Funds to TMA in accordance with Section 3 herein, TMA's substantial failure to operate the Shuttle, the disestablishment of the PBID pursuant to Street and Highways Code 36670, misappropriation of funds, malfeasance or a violation of law in connection with the management or expenditure of the PBID Funds.

9. Indemnification. TMA shall indemnify, keep and save harmless the CITY, its officers, agents while acting in that capacity and employees (collectively, "CITY Indemnitees") against any and all suits, claims or actions arising out of any injury to persons or property that

may occur, or that may be alleged to have occurred, in the course of the operation of the Shuttle caused by a negligent act or omission or the intentional misconduct of TMA or its employees, contractors, subcontractors, representatives or agents. Except in the event of active negligence on the part of CITY Indemnitees, TMA further agrees to defend any and all such actions, suits or claims and pay all charges of attorneys and all other costs and expenses arising therefrom or incurred in connection therewith; and if any judgment be rendered against the indemnitees in any such action, TMA shall, at its expense, satisfy and discharge the same. This indemnity shall survive the termination of this Agreement.

CITY shall indemnify, keep and save harmless TMA, its officers, agents while acting in that capacity and employees (collectively, "TMA Indemnitees") against any and all suits, claims or actions arising out of the administration of the PBID or the collection of the PBID Funds. Except in the event of active negligence on the part of the TMA Indemnitees, CITY further agrees to defend any and all such actions, suits or claims and pay all charges of attorneys and all other costs and expenses arising therefrom or incurred in connection therewith; and if any judgment be rendered against the indemnitees in any such action, CITY shall, at its expense, satisfy and discharge the same. This indemnity shall survive the termination of this Agreement.

10. Insurance.

(a) TMA shall ensure that its contractor shall procure and maintain the following types of insurance:

(1) Workers' Compensation and TMA's Liability Insurance. TMA's contractor(s) shall procure and maintain Workers' Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the State of California. Employer's Liability Insurance shall have coverage for a minimum liability of \$2 million covering its employees engaged in the work. TMA shall insure the procurement and maintenance of such insurance by all contractors engaged in provision of the Shuttle.

(2) Liability Insurance. TMA's contractor(s) shall procure and maintain the following kinds of liability insurance, which shall include as additional insureds the City of Emeryville, its council members, officers, employees and agents while acting in such



capacity, and their successors or assignees, as they now or as they may hereafter be constituted, singly, jointly or severally:

(A) Commercial General Liability insurance providing bodily injury and property damage coverage with a combined single limit of at least \$ 10 million each occurrence or claim and a general aggregate limit of at least \$ 10 million. This insurance coverage shall include, but not be limited to, premises and operations; contractual liability; products and completed operations; broad form property damage.

(B) Automobile Liability insurance providing bodily injury and property damage with a combined single limit of at least \$ 10 million each occurrence or claim. This insurance shall provide contractual liability covering all motor vehicles including owned, non-owned and hired vehicles and mobile equipment to the extent it may be excluded from general liability insurance.

In the event TMA operates the shuttle directly (without utilizing a contractor) it shall provide insurance equivalent to that stated above.

(b) During the term of this Agreement, the TMA shall maintain the following types of insurance:

(1) Workers' Compensation and Employer's Liability Insurance. If it has any employees, TMA shall procure and maintain Workers' Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the State of California. Employer's Liability Insurance shall have coverage for a minimum liability of \$1 Million Dollars covering TMA's employees engaged in the work. TMA shall insure the procurement and maintenance of such insurance by all subcontractors engaged in provision of the Shuttle.

(2) Liability Insurance. TMA shall procure and maintain the following kinds of liability insurance, which shall include as additional insureds the City of Emeryville, its council members, officers, employees and agents while acting in such capacity, and their

successors or assignees, as they now or as they may hereafter be constituted, singly, jointly or severally:

(A) Commercial General Liability insurance providing bodily injury and property damage coverage (with a combined single limit) of at least \$ 1 million each occurrence or claim and a general aggregate limit of at least \$ 2 million. This insurance coverage shall include, but not be limited to, premises and operations; contractual liability; products and completed operations; broad form property damage.

(B) If the TMA owns or operates any vehicles, it shall maintain Automobile Liability insurance providing bodily injury and property damage with a combined single limit of at least \$ 1 million each occurrence or claim. This insurance shall provide contractual liability covering all motor vehicles including owned, non-owned and hired vehicles and mobile equipment to the extent it may be excluded from general liability insurance.

(c) Prior to commencing Shuttle service, TMA shall file a Certificate(s) of Insurance with the City Risk Manager evidencing the required coverages and endorsement(s) and, upon request, a certified duplicate original of any of those policies. Said Certificate(s) shall stipulate:

(1) The insurance company(ies) issuing such policy(ies) shall give written notice to the City's Risk Manager of any material alteration, or reduction in aggregate limits, if such limits apply, and provide at least thirty (30) days' notice of cancellation or modification.

(2) That the policy(ies) is Primary Insurance and the insurance company(ies) providing such policy(ies) shall be liable thereunder for the full amount of any loss or claim which the TMA (or contractor) is liable up to and including the total limit of liability, without right of contribution from any other insurance which is in effect for the benefit of the CITY.

(3) The policy shall also stipulate: Inclusion of the CITY shall not in any way affect the rights of such additional insureds as respects to any claim, demand, suit or judgment made, brought or recovered against the TMA, and shall protect them in the same manner as though a separate policy had been issued to each, but nothing in said policy shall operate to increase the insurance company's liability as set forth in its policy beyond the amount or amounts shown or to which the insurance company would have been liable if only one interest had been named as an insured.

(d) The insurance policy(ies) shall be written by an insurance company or companies acceptable to CITY. Such insurance company shall be authorized to transact business in the state of California.

(e) TMA shall also assure that any third party contractor engaged by TMA to operate the Shuttle shall, at its own cost and expense, procure and maintain during the term of this Agreement, comprehensive public liability (including bodily injury, property damage, and automobile liability) insurance coverage for its operation of the Shuttle in an amount equaling or exceeding the minimum amounts required as a condition to each transportation provider's authority to operate by the Public Utility Commission or other city, municipality, agency or governing body conferring said authority, and shall further assure that each of the CITY Indemnites specified in Section 10 above are named as additional insureds on such policy. Prior to the operation of the Shuttle by such a contractor, TMA shall obtain from said contractor a Certificate of Insurance evidencing the above-specified coverage. The Certificate shall further provide that the contractor's policy is primary over any insurance carried by any CITY Indemnitee specified in Section 10 and that the policy will not be cancelled or the coverage reduced without thirty (30) days prior notice in writing being given to TMA. TMA will furnish the CITY with a copy of the Certificate of Insurance of each contractor prior to that contractor's operation of the Shuttle.

12. Notices. Any notice, report, request, instruction or other document required by this Agreement will be in writing and delivered in person to a representative of the parties at the address below, or by mailing the same by registered or certified mail, postage prepaid, addressed as follows:

If to the CITY: City of Emeryville  
1333 Park Avenue  
Emeryville, CA 94608-3517  
Attention: City Manager

If to TMA: Emeryville Transportation Management Association  
1300 67th Street  
Emeryville, CA 94608  
Attention: TMA Director

Any notice served personally shall be deemed received upon delivery; any notice mailed via registered or certified mail as provided above shall be deemed received three (3) days after it is postmarked by the U.S. Mail Service. Either party may change its address by sending notice of the change to the other party as provided herein.

13. Liaison. CITY and TMA shall each designate one or more persons to act as contact or liaison with the other party with regard to the day to day activities of the Program. TMA's liaison shall be responsible, among other things, for complying with the reporting requirements specified in Section 5 above, and coordinating the marketing program required by Section 6 above. Each party's liaison is as follows:

CITY Liaison: Assistant to City Manager (currently Karen Hemphill)  
(PBID Administration)

Director of Public Works (currently Maurice Kaufman)  
(EGR Operations)

TMA's Liaison: TMA Director (currently Wendy Silvani)

14. Entire Agreement. This Agreement constitutes the entire agreement of the parties with respect to its subject matter and supersedes any prior or contemporaneous oral or written understandings of the parties on the same subject. This Agreement may only be amended in writing signed by both of the parties hereto. The parties intend this Agreement to be an integrated agreement.

15. Attorneys' Fees. In the event legal proceedings are instituted by either of the parties to enforce any term of this Agreement or to determine the rights of the parties hereunder,

the prevailing party in said proceedings shall recover, in addition to all court costs, reasonable attorneys' fees.

16. Relationship. Pursuant to this Agreement, the CITY is merely a funding agency for transportation provided by TMA, which is acting as an independent contractor under the Shuttle Program. CITY shall not direct, manage or control the operations of TMA, but, in its fiduciary role as the distribution of PBID Funds, shall review the financial management of the TMA to ensure that funds are properly expended pursuant to the terms of the PBID Management District Plan. Nothing herein shall be deemed to create a partnership, joint venture, or employment relationship between the CITY and TMA.

17. Compliance with Law. Each party to this Agreement shall comply with any and all laws, statutes, ordinances, rules, regulations or requirements of federal, state or local government, or any agency thereof, which relate to or in any manner affect the performance of this Agreement. As the TMA acts as the owner's association of the PBID, and pursuant to Street and Highways Code 36614.5, the TMA must comply with the Ralph M. Brown Act and Public Records Act. In addition, TMA shall submit a copy of each regular or special meeting agenda of the TMA Board which includes discussion and/or action items relating to the PBID to the City Clerk's Office via facsimile and email, at least three (3) days in advance of a regular meeting and at least one (1) day in advance for special meetings. The City Clerk shall then post said agendas at three (3) public posting places in the City of Emeryville.

18. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be but one Agreement.

19. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California as applied to contracts made and performed entirely in California.

20. Successors. The obligations created under this Agreement shall be binding on, and the rights established herein shall inure to the benefit of, the successors and permitted assigns of the parties hereto.

21. Assignment. The rights, obligations, and responsibilities of the TMA under this Agreement shall not be assigned by the TMA to any third party without the prior written consent of the City, which consent may be withheld by the City in its reasonable discretion.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date first written above with the intent to be legally bound.

**CITY OF EMERYVILLE**, a municipal corporation

**EMERYVILLE TRANSPORTATION MANAGEMENT ASSOCIATION, a California Non-Profit Public Benefit Corporation**

By: \_\_\_\_\_  
Name: Patrick O'Keeffe  
Title: City Manager

By: Wendy Silvano  
Name: Wendy Silvano  
Title: Director

APPROVED AS TO FORM:

Michael G. Biddle  
Michael G. Biddle  
City Attorney

## EXHIBIT A

### Service Parameters

Days of Service: Monday through Sunday, Weekdays (except the following holidays: New Year's Day, Presidents' Day, Easter, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas)

Routes: Service shall be provided along such routes as may be determined by the TMA Board of Directors.

Schedule: Service shall generally operate between the hours of 6 a.m. and 10 p.m. on weekdays, 10 a.m. and 9:30 p.m. on Saturdays and 11 a.m. and 7:00 p.m on Sundays. The TMA Board may determine an alternative schedule to meet revised service demands and/or budget constraints.