

**MEMORANDUM**

**To:** Mayor and City Council

**From:** Michael Smith, Public Works Director

**Date:** January 09, 2017

**Subject:** **Approval of an Access and Maintenance Agreement with MARTA for the Hammond Mid-Block Pedestrian Crossing**

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**BACKGROUND**

The attached access and maintenance agreement accompanies the subgrant agreement presented in the preceding agenda item. PCID has been awarded federal funds of up to \$320,000 for construction of a mid-block pedestrian signal across Hammond Drive near the bus entrance to the Dunwoody MARTA station. The signal will be a pedestrian hybrid beacon (commonly referred to as a HAWK) which displays a red light to drivers when the pedestrian activates the signal. The purpose of the signal will be to provide a safer crossing for pedestrians exiting the buses at the MARTA station and crossing to the retail and offices on the south side of Hammond Drive.

Whereas the subgrant agreement allows for receipt of the federal funding, the access and maintenance agreement provides a construction easement to the PCID and a maintenance easement to the city for the parts of the project that extend onto MARTA property. As outlined in Attachment B-1 of the subgrant agreement, the PCID is providing the required local matching funds of \$80,000 and has funded the design and the construction management. No city funds are being utilized for construction. The agreement stipulates that the city will become the owner of the improvements within its right of way and will be responsible for future maintenance of the improvements in the right of way and within the easement area.

**RECOMMENDED ACTION**

Staff recommends approval of the access and maintenance agreement subject to final review by the city attorney.

## INTERGOVERNMENTAL AGREEMENT FOR ACCESS AND MAINTENANCE EASEMENT

**THIS ACCESS AND MAINTENANCE EASEMENT AGREEMENT** ("Agreement"), is entered into and made effective as of \_\_\_\_\_, 2016 ("Effective Date"), between and among PERIMETER COMMUNITY IMPROVEMENT DISTRICTS, a \_\_\_\_\_ ("PCID"), the CITY OF DUNWOODY, GEORGIA, a municipal corporation of the State of Georgia ("City", together with PCID collectively referred to herein as the "Developer") and the METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, a public body corporate created under Georgia Laws 1965, pp. 2243, et seq., as amended ("MARTA"). MARTA, City and PCID are sometimes referred to herein individually as a "Party" and collectively as the "Parties."

### BACKGROUND STATEMENT

MARTA is the owner of that certain tract of land located at the northeast corner of the intersection of Hammond Drive, N.E., and Perimeter Center Parkway, N.E., in the City of Dunwoody, DeKalb County, Georgia and a portion MARTA's Dunwoody rail station is located thereon and is described on Exhibit A ("MARTA's Property"). PCID intends to construct certain Connection Improvements (hereinafter defined) on MARTA's Property and the City's right of way (as constructed, the "Project") and, in connection with the construction of the Project, Developer desires to construct improvements that will provide a direct connection to and from the Hammond Drive, MARTA's Property and MARTA's Dunwoody rail station (the "Connection").

The improvements that currently exist on MARTA's Property include, among other things, elevated rail tracks and, on the northern end of MARTA's Dunwoody rail station (the "Dunwoody Station"), a bus intermodal facility with an entrance and curb cut on Hammond Drive. Developer will construct new improvements, in accordance with the Plans (as defined in Section 1.2 below), to include a mid-block ADA accessible pedestrian crosswalk on Hammond Drive and HAWK singling equipment, as well as sidewalk enhancements, pavement, security cameras, lighting, landscaping, fencing on MARTA's Property (collectively, the "Connection Improvements") so as to foster greater pedestrian connectivity between the northside and southside of Hammond Drive and greater ingress and egress to and from Dunwoody Station. MARTA and PCID acknowledge and agree that the Connection Improvements will include the removal and replacement of a security gate located on MARTA's Property (the "Security Gate") in accordance with the Plans. However, it is the intent and desire of the City, PCID and MARTA that the Connection Improvements will be designed and constructed by PCID, owned by either MARTA or the City (depending upon where the improvements are located), maintained in accordance with this Agreement and be located on land owned by MARTA or within the City's right of way.

### WITNESSETH:

**WHEREAS**, it is desired by MARTA and Developer that Developer will design, construct, install, maintain, repair and replace the Connection Improvements in accordance with this Agreement; and

**WHEREAS**, the Connection Improvements, once completed, will be a direct benefit to MARTA and are provided in exchange for the easements being granted by MARTA.

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements of the Parties set forth herein and other good and valuable consideration, the receipt and legal sufficiency of which are acknowledged by the Parties, MARTA, City and PCID, intending to be legally bound, hereby agree as follows:

### ARTICLE I DEFINITIONS

1.1 Recitals. The Background Statement and recitals set forth hereinabove are incorporated in this Agreement by this reference.

1.2 Definitions. Unless specifically noted to the contrary, the following words, phrases and terms, when used in this Agreement or the exhibits hereto, shall have the meaning set forth below:

- (a) "Applicable Law(s)" shall mean and have reference to any and all present and future statutes, ordinances, rules, regulations, or binding determinations by the United States Government, the State of Georgia, the City of Dunwoody, the County of DeKalb, or any other governmental authority having power or jurisdiction over Developer and the Connection Improvements, or either of them.
- (b) "Connection Improvements" is defined in the Background Statement. The Connection Improvements shall be constructed substantially in accordance with the Plans.
- (c) "Construction" means and has reference to any activity normally encompassed by any of the following terms: construction, reconstruction, demolition, excavation, building, rebuilding, renovation, environmental remediation, or any similar term occurring on or affecting MARTA's Property pursuant to this Agreement.
- (d) "Day" shall mean and have reference to any one calendar day, unless specifically noted to the contrary.
- (e) "Default" shall mean and have reference to an occurrence of any act or omission which, with giving of notice or passage of time, or otherwise, may become an Event of Default.
- (f) "Hazardous Materials" shall mean and have reference to: (A) any hazardous substance, material or waste listed in the United States Department of Transportation Hazardous Materials Table (49 CFR 172.101) or by the Environmental Protection Agency as hazardous substances in 40 CFR Part 302 and amendments thereto and replacements therefor; and (B) such hazardous substances, materials or wastes that are or may become regulated under any Environmental Law.
- (g) "Interference" means and have reference to any or all of the following: any condition, act or omission which is directly or indirectly caused by Developer (or Developer's contractors, agents or employees) which, in any manner, (i) obstructs, impairs or interrupts, or endangers the safety or the operation of the Transit System, or (ii) endangers the safety of MARTA's patrons; or (b) causes a public or private nuisance on MARTA's Property.
- (h) "MARTA Operations" means any and all operations performed by MARTA (or at MARTA's direction or on MARTA's behalf) or its contractors, subcontractors, agents or employees including, without limitation, any and all operations related to or involving the operation of the Transit System.
- (i) "MARTA's Property" is defined in the Background Statement.
- (j) "Plans" means the architectural and engineering plans, supporting calculations, shop drawings and specifications, including any revisions, addenda and exhibits required for construction of the Connection Improvements once approved by MARTA and PCID, which Parties acknowledge and agree will be compatible with the concept drawings submitted by PCID on May 20, 2016 and approved by MARTA on July 12, 2016. Any modification to the Plans that deviate from the approved Plans must have prior approval by MARTA, which will be granted or denied in accordance with Section 3.2(b).
- (k) "Substantial Completion" means the point at which a certificate prepared by PCID's architect and/or engineer has been issued certifying to MARTA (and any other entity PCID desires) that the Connection Improvements have been constructed substantially in accordance with the Plans and a Certificate of Occupancy (as defined below), if applicable, has been issued for the Connection Improvements.
- (l) "Substantial Completion Date" means the date upon which Substantial Completion has occurred.
- (m) "Transit System" shall mean and have reference to any activity conducted in connection with MARTA's Rapid Transit System and Project (as defined in Section 2 of the MARTA Act).

- (n) "Unavoidable Delays" shall mean and include, with specificity, the following events that would be considered under this Agreement, as a force majeure event and shall mean and have reference to delays due to causes beyond the reasonable control of Developer, including, but not be limited to, delays due to: strikes, labor disputes, or work stoppages (legal or illegal); adverse weather conditions not reasonably foreseeable; acts of God; floods, fires or other casualty; epidemics; freight embargoes; delays of contractors, subcontractors, and suppliers for reasons set forth in this definition; unusual delay in transportation; unavailability of, or inability to obtain labor; unavailability of, or unusual delay in the delivery of, fuel, power, supplies or materials; governmental actions, restrictions, regulation or moratorium; enemy action; riot, civil commotion, insurrection, war or terrorism; sabotage; restraint or other act by court or public authority; the passage or reasonably unexpected interpretation or application of any statute, law or regulation. Developer shall notify MARTA of the cause or causes of delay within ten (10) days after the date on which Developer first becomes aware of such delay. ***THE PARTIES ACKNOWLEDGE AND AGREE THAT THE INABILITY TO PAY ANY MONETARY SUM IS NOT AN UNAVOIDABLE DELAY OR FORCE MAJEURE EVENT FOR PURPOSES OF THIS AGREEMENT.***

## **ARTICLE II**

### **CONVEYANCES AND REAL PROPERTY RIGHTS**

2.1 Easements. Subject to this Agreement, PCID and/or MARTA will execute and deliver the documents below [the documents in (a) and (b) being the "Conveyance Documents"]:

(a) Bill of Sale to MARTA. Developer will convey title to those portions of the Connection Improvements pursuant to a Bill of Sale in the form of Exhibit B.

(b) Construction Easement. MARTA hereby grants to PCID, for the use by PCID, its agents and contractors, an easement on, over, under, across and through the MARTA's Property for the construction, installation, maintenance, repair and replacement of the Connection Improvements in accordance with the approved Plans (the "Construction Easement"). The easement granted under this Section includes all rights necessary and appropriate to effect the construction, installation, maintenance, repair and replacement of the Connection Improvements. Notwithstanding anything to the contrary contained in this Agreement, the Parties hereto acknowledge and agree that MARTA may require the removal and replacement of that certain crosswalk located on MARTA Property if in MARTA's reasonable determination the material fails to serve the purpose for which it was intended. This Construction Easement shall terminate on Substantial Completion as set forth herein.

(c) Permanent Access and Maintenance Easement. MARTA hereby grants to Developer, for the use by Developer and its employees, agents and contractors, an easement on, over, under, across and through the MARTA's Property for the maintenance, repair and replacement of the Connection Improvements in accordance with the Plans, respectively, as the same have been and will be approved by MARTA pursuant hereto (the "Construction Easement"). The easement granted under this Section 2.1(c) includes all rights necessary and appropriate to effect the construction of the Temporary Improvements and the Connection Improvements. This Permanent Access and Maintenance Easement shall terminate on upon the expiration or earlier termination of this Agreement.

(d) Reserved.

## **ARTICLE III**

### **CONSTRUCTION AND DEVELOPMENT**

3.1 Obligation of Developer to Construct Connection Improvements. As a material part of the consideration for MARTA entering into this Agreement, Developer acknowledges and agrees that once Construction commences, PCID will diligently and continuously prosecute to completion the Construction of the Connection Improvements at PCID's sole expense and in accordance with the terms and conditions of this Agreement.

### 3.2 Approval of Plans & Specifications by MARTA.

(a) PCID has requested that MARTA provide plan input and approval as the plans for the Connection Improvements are in process such that, at the time the final plans are submitted to MARTA, MARTA's review of most aspects of the plans will have been completed. Accordingly, PCID intends to submit the plans at the following stages of document development: 30%, 60%, 90% and 100%. MARTA agrees to respond to each submittal within ten (10) days. If MARTA has not provided written approval or objections to the plans by the day which is ten (10) days after MARTA receives each set of plans, then MARTA shall be deemed to have approved the set of plans so submitted. The final plans for the Connection Improvements as so approved, or deemed approved, by MARTA are the "Plans" as that term is used in this Agreement.

(b) MARTA may, as a condition of approval of the Plans, require that the Plans be altered prior to MARTA's approval, so that the design of the Connection Improvements will permit MARTA to make future alterations to, enhancements of or additions to the existing Transit System. PCID and MARTA shall have the right during the course of construction of the Connection Improvements to request changes in the Plans approved pursuant to Section 3.2(b) hereinabove, as a result of (i) unforeseen conditions, (ii) errors on the part of any of the Parties' development or review of the Plans, (iii) changes in governmental statutes, regulations, orders, or requirements, including building codes and safety codes if and to the extent the same are retroactive, or (iv) other conditions which may affect the safety of the Connection Improvements or MARTA's Property or its operations thereon. Approval of such requests shall not be unreasonably withheld, conditioned or delayed by either PCID or MARTA. MARTA and PCID acknowledge that any change in the Plans must be promptly reviewed and agreed upon in order to facilitate ongoing Construction. Each Party agrees to meet within three (3) business days after receipt of a written request via electronic mail to Jennifer Harper (jharper@perimetercid.org), for PCID, or Mr. Jeff Masisak (jmasisak@itsmarta.com), for MARTA for approval of a change to the Plans and to diligently respond to the request until the change is finalized. If MARTA does not respond to a request for approval of a change to the Plans within ten (10) days after a second written notice is given by electronic mail to Mr. Cedric McKitt (cmckitt@itsmarta.com), for MARTA, the change will be deemed approved. If the representatives of either MARTA or PCID changes, a notice will be given pursuant to the Notice section of this Agreement identifying the new representative and the e-mail address to use.

### 3.3 Commencement and Substantial Completion of Construction of Connection Improvements.

(a) PCID will give MARTA not less than thirty (30) Days prior, written notice of the date on which PCID will enter MARTA's Property to prepare the site for Construction prior to the demolition of the existing improvements on MARTA's Property. Not later than thirty (30) days prior to commencement of Construction of the Connection Improvements, PCID will submit its proposed Construction schedule (the "Construction Schedule") to MARTA. Once PCID commences Construction of any work on MARTA's Property pursuant to this Agreement, PCID will be obligated to thereafter diligently prosecute the Connection Improvements and any related work to completion, subject to Unavoidable Delays. In the event that PCID fails to commence Construction activities by \_\_\_\_\_ (the "Outside Commencement Date"), MARTA shall have the right to terminate this Agreement by delivering notice of such termination to PCID within ninety (90) days after the Outside Commencement Date. Notwithstanding the foregoing provisions of this Section 3.3(a) to the contrary, MARTA shall have no right to terminate this Agreement pursuant to this Section if PCID (i) has made a formal submission of Plans to the appropriate governmental authorities of the City of Dunwoody, and either has received or has not received, but is diligently pursuing the issuance of, all permits necessary for the Construction of the Connection Improvements, or (ii) has actually commenced Construction prior to receipt of the notice from MARTA.

(b) Once PCID commences Construction on MARTA's Property, PCID shall cause the Substantial Completion of the Connection Improvements to occur by the date which is not later than three hundred (300) Days after commencement of Construction on MARTA's Property, subject to Unavoidable Delays.

(c) PCID shall comply with the following covenants in connection with the performance of any Construction:

(i) PCID shall construct the Connection Improvements in compliance with fire and building codes and regulations as determined to be applicable by the City of Dunwoody.

(ii) All Connection Improvements shall be constructed with new and first-class materials and in a first-class workmanlike manner and shall be constructed in substantial and material compliance with the Plans.

(iii) Any and all Connection Improvements shall be constructed at the sole cost and expense of PCID (or other persons other than MARTA).

(iv) PCID hereby agrees to keep MARTA notified of Construction scheduled for MARTA's Property, to provide MARTA with regular Construction Schedule updates on a monthly basis and to allow MARTA and MARTA's authorized representatives, agents and employees to inspect any Construction upon MARTA's Property in order to determine whether PCID is complying with PCID's undertakings, duties and obligations under this Agreement. Such inspection shall not unreasonably interfere with any Construction being done by or on behalf of PCID. No such inspection shall be deemed or construed as a waiver or approval of any default which exists at the time of such inspection and about which MARTA does not give notice to PCID.

(v) As soon as practical and in all events within ninety (90) days after Substantial Completion, PCID shall furnish to MARTA, at PCID's sole cost and expense, (a) electronic copies of final "As-Built" plans and specifications of the completed improvements, and (b) electronic copies of a current, accurate, properly labeled, and certified plat of survey, prepared by a land surveyor qualified and registered with the State of Georgia, depicting to scale the location of the Connection Improvements as the same have been constructed.

(vi) Upon Substantial Completion or as soon as the same may reasonably be obtained, PCID shall deliver to MARTA, a (a) certificate from its architect evidencing Substantial Completion, (b) certificate of occupancy (or other applicable documentation) issued by the City of Dunwoody ("City") approving the completion of the Construction and compliance with Applicable Laws if and to the extent the same is required by the City and (c) MARTA's written approval of the improvement located on MARTA's Property (for convenience, referred to as the "Certificate of Occupancy"). MARTA and PCID agree that delivery of such Certificate of Occupancy shall constitute conclusive evidence of Substantial Completion of Construction of the Project Improvements for the sole purpose of determining whether the Substantial Completion Date has been met, but shall not constitute evidence of the conformity of said Construction with the other express requirements of this Agreement.

(vii) PCID acknowledges that MARTA makes no representations or warranties concerning the suitability or capacity of MARTA's Property to provide adequate support for any improvements to be constructed upon, within, above, below or abutting MARTA's Property. Developer hereby fully assumes any and all risk of the suitability and capacity of MARTA's Property for providing adequate support for the Connection Improvements.

(viii) PCID shall maintain proper soil erosion, sediment and drainage control at all locations affecting MARTA's Property during Construction in a manner that is reasonably acceptable to MARTA and so as not to constitute an Interference.

3.4 Payment of Bills for Construction. PCID shall pay, or cause to be paid, as they become due and payable, all bills for labor, materials, insurance, bonds, and all fees of architects, engineers, contractors, subcontractors, surveyors, and all other costs and expenses incident to the Construction of the Connection Improvements. Notwithstanding the foregoing provisions of this Section, PCID may, in good faith, at its sole cost and expense and in its own name, dispute and contest any such bill, fee, cost or expense and in such event, any

such item need not be paid until adjudged to be valid. Unless so contested, all such items shall be paid, and if contested, any such item shall be paid before the issuance of an execution on a final judgment with respect thereto; provided, however, that any lien or claim of lien shall be contested only in accordance with Section 3.5, below.

3.5 Discharge of Liens. Within thirty (30) days of notice of the filing of a lien as described below, Developer shall remove and shall promptly discharge, by filing of bond or by other lawful means, and shall satisfy of record at Developer's sole cost and expense, any lien, claim of lien, or other encumbrance affecting MARTA's Property (including, without limitation, real property that is not presently owned by MARTA but will be conveyed to MARTA in accordance with the terms of this Agreement) or any portion thereof and arising by reason of any labor, service, or materials furnished or claimed to have been furnished to MARTA's Property or any portion thereof to or on behalf of Developer for any Construction or other work, regardless of where such alleged work occurred; provided, however, that the foregoing covenant shall not be applicable to any lien, claim of lien, or encumbrance arising out of any work or alleged work performed by MARTA or any party claiming by, through or under MARTA. PCID agrees to indemnify and hold MARTA harmless from any and all losses, claims, or damages resulting from the recording or foreclosure of any such liens or claims of lien arising by, through or under PCID. Notwithstanding any foregoing provisions to the contrary in this Section, Developer shall have the right (without first discharging the same) to contest in good faith any such lien, claim or encumbrance so long as it does so diligently and by appropriate proceedings and without prejudice to MARTA and so long as neither MARTA's Property nor any Connection Improvements nor any interest in either thereof would be in any imminent danger of sale, loss or forfeiture as a result of such proceeding or contest and thereafter shall, upon MARTA's request, promptly provide a bond or other security reasonably satisfactory to MARTA to protect MARTA's interest. Developer will release the lien by bond or otherwise should the contest be unsuccessful. In the event Developer shall contest any such lien, claim or encumbrance, Developer shall promptly notify MARTA of such contest. If Developer shall fail to timely discharge any such claim or demand as aforesaid, MARTA may do so and any and all expenses incurred by MARTA shall be promptly paid by PCID on demand.

3.6 Security for Completion. PCID hereby absolutely, unconditionally and irrevocably guarantees, as principal obligor, and not merely as surety, to MARTA, the due and punctual payment and performance, in full, of all liabilities and obligations of PCID under this Agreement (collectively, the "Obligations") without regard to the ultimate cost of the Connection Improvements. The Obligations shall be absolute and unconditional under any and all circumstances, including without limitation, circumstances which might otherwise constitute a legal or equitable discharge of a surety or guarantor. The obligation of the PCID hereunder shall not be discharged, impaired or otherwise affected by the failure of MARTA to assert any claim or demand against PCID or to enforce any remedy hereunder.

3.7 Building Permits. Prior to Construction, PCID shall obtain any and all permits, licenses or other permits required by Applicable Law, for the Construction of the Connection Improvements. MARTA agrees to cooperate with PCID in efforts to obtain such permits, certificates or licenses, provided any third party expenses of MARTA reasonably necessitated by such cooperation and for which MARTA gives PCID advance notice (including, without limitation, reasonable attorneys' fees and all costs of litigation) are promptly reimbursed on demand.

3.8 Environmental Matters. MARTA has made no warranty or representation with respect to Hazardous Materials to Developer.

**ARTICLE IV**  
**Engineering, Safety, Supervision and**  
**Security**

4.1 Supervision and Safety Requirements. During Construction of the Connection Improvements, PCID acknowledges and agrees to adhere to, among others, the following safety and supervision requirements:

(a) PCID shall have general charge of engineering for the Connection Improvements, but nothing herein shall deny MARTA the reasonable right to place inspectors on work being performed by PCID on MARTA's Property or to perform such reasonable engineering services as may be necessary for the work performed by PCID on MARTA's Property.

(b) The Parties acknowledge that PCID's personnel and equipment will be working on MARTA's Property and that MARTA's operating tracks near the Connection Improvements; therefore, Construction and site safety is a critical part of the PCID's Construction operations. The PCID will adhere to all safety requirements issued by MARTA when working on MARTA's Property. This requirement does not relieve the PCID of its responsibility to take additional safety measures that may be necessary and advisable during Construction.

(c) PCID personnel working within the limits of MARTA's Property shall have an approved identification tag prominently displayed on their person, in accordance with MARTA procedures, as the same may change from time to time (and be universally imposed on parties working on land owned by MARTA) in MARTA's sole discretion.

(d) PCID will identify elements of Construction which may require flagging or inspection services and the Parties will work together to schedule such work when flagging protection or inspection services are available at the job site. MARTA will cooperate with PCID to make such flagging and inspection services promptly available. Additionally, PCID and MARTA will cooperate to schedule work of a nature which would impede MARTA's operation of the Transit System in a manner which will eliminate or minimize the impediment to the Transit System.

(e) PCID shall keep all areas affected by Construction on MARTA's Property in a clean and orderly manner. PCID shall promptly clean and remove any refuse, construction debris or any other items on MARTA's Property when so directed by MARTA. If PCID fails to respond to MARTA's request to clean the site in a timely manner, then MARTA shall have the right to clean the area with its own forces or contract forces at the expense of PCID.

(f) Notify MARTA if any environmental hazard or contamination is found within the boundaries of MARTA's Property.

(g) Upon completion of Construction, PCID shall remove from within the limits of MARTA's Property, all machinery, equipment, surplus materials, false work, rubbish, temporary buildings and other property of PCID (or its contractors, agents and employees) and leave MARTA's Property in a condition reasonably satisfactory to MARTA.

(h) Two security cameras (as identified on the Plans) have been incorporated within the design of the Connection Improvements. Both of the cameras (as identified on the Plans) are located on MARTA's property and the PCID shall be solely responsible for the cost to acquire (including, a use license, which shall not exceed \$700.00 per camera), install and connect the security cameras regardless of the location thereof to the MARTA CCTV network.

#### 4.2 No Interference with Transit System.

(a) PCID hereby agrees that the Construction of the Connection Improvements, and any work or activity connected therewith undertaken by or on behalf of PCID, or any prime or general contractors, any subcontractors, any independent contractors, and any agents or employees of PCID, shall be performed in such a manner so as to avoid or minimize to the extent reasonably possible any Interference. Should any Construction (or other activity performed by or on behalf of PCID) on MARTA's Property constitute an Interference, MARTA shall have the right to undertake remedial activity to the extent reasonably necessary to allow the safe and efficient operation of the Transit System to continue. MARTA shall undertake any such remedial activity at the sole cost and expense of PCID. PCID shall fully reimburse MARTA for all reasonably necessary costs and expenses (including, without limitation, actual attorneys' fees reasonably incurred and all costs of litigation) incurred by MARTA in connection with said remedial activity within thirty (30) Days after PCID's receipt of MARTA's written demand for reimbursement.

(b) Prior to exercising any right under Section 4.1(e) or under Section 4.2(a) to cure or correct any Interference (except in the case of any Interference which results, as reasonably determined by MARTA, in an emergency condition), MARTA shall give written notice to PCID, which notice shall briefly



specify the Interference with particularity to reasonably inform PCID of the conditions constituting the Interference in order for PCID to cure such conditions (such notice being hereinafter referred to as the "Notice of Interference"). Except as may be otherwise provided in this Agreement, PCID shall be responsible for curing or correcting the Interference within a period of five (5) Days following PCID's receipt of such Notice of Interference; provided, however, that if such cure or correction cannot reasonably be effected within said five (5) Day period, then PCID shall be required to commence within said five (5) Day period action to effect such cure or correction and thereafter to prosecute diligently and continuously such action until such cure or correction has been effected. In the event that PCID so effects such cure or correction following any Notice of Interference, then MARTA shall not be entitled to cure or correct the Interference described in such Notice of Interference. Notwithstanding the foregoing, MARTA may perform such work as is reasonably necessary to cure or correct such Interference if PCID refuses or fails to timely undertake such actions as are required to be taken in accordance with this Section to effect such cure or correction.

(c) The Construction of the Connection Improvements shall be conducted only by use of construction methods and techniques that do not endanger the safety of any persons using, operating, or maintaining the Transit System. In the event that MARTA serves upon PCID written notice that any Construction activity, method, or technique constitutes threat of immediate danger to persons using, operating, or maintaining the Transit System, all Construction work that was the cause of the specified threat of danger shall be halted as quickly as reasonably and safely possible at no cost or expense to MARTA and shall not be continued until PCID and MARTA have reached an agreement regarding the elimination of said threat of danger. The Parties will promptly meet to work towards a solution so as to keep the Construction on schedule.

(d) Nothing herein shall deny MARTA the right as necessary or desired to operate its Transit System. PCID agrees that it shall not make any claim against MARTA for damages resulting from delays to the Construction of the Connection Improvements or PCID's other construction occurring near MARTA's Property due to MARTA's scheduled operation of the Transit System.

#### 4.3 Flagging & Inspection.

(a) MARTA shall have the sole authority to determine the need for flagging services to protect its operating rail system; those services will be furnished by MARTA and paid for during Construction of the Connection Improvements by MARTA. Flagging services will be required when the PCID's personnel and equipment are, or may be, working within the wayside fence, or over tracks, or when the work has disturbed, or may disturb, the surface and alignment of the track. When flagging and inspection is required pursuant to this section (or any other services requested by PCID not contemplated herein and provided by MARTA), the same will be furnished by MARTA and paid for during Construction of the Connection Improvements by PCID.

(b) Inspection services will be required when the PCID's personnel and equipment are, or may be, working on MARTA's Property or near MARTA's infrastructure that requires safe clearance approval by MARTA. Inspector(s) are required to notify MARTA operations of the activities that could potentially impact operations. Those services will be furnished by MARTA and paid for during Construction of the Connection Improvements by PCID.

4.4 Warranty. PCID warrants to MARTA that materials and equipment furnished under this Agreement will be of good quality and new unless otherwise required or permitted by this Agreement, that the Construction of the Connection Improvements will be free from defects not inherent in the quality required or permitted, and that the Construction of the Connection Improvements will conform with the requirements of this Agreement. Construction not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective by the City or MARTA. PCID's warranty excludes remedy for damage or defect caused by abuse, improper or insufficient maintenance, improper operation, or normal wear and tear under normal transit (including, without limitation, commercial bus) usage. If required by any Party, PCID shall furnish satisfactory evidence as to the kind and quality of materials and equipment. If, within five (5) years after the date of Substantial Completion of the Work or designated portion thereof, the Construction of the Connection Improvements

is found to be not in accordance with the requirements of this Agreement, PCID shall correct it promptly after receipt of written notice from MARTA to do so unless MARTA has previously given authorization for such deviation in writing. This Section 4.4 shall survive acceptance of the Connection Improvements by MARTA and the expiration or termination of this Agreement. MARTA shall give prompt notification to PCID after the discovery of any defective condition.

**ARTICLE V**  
**INDEMNIFICATION AND INSURANCE**

5.1 Indemnification By PCID during Construction.

(a) As a material part of the consideration for this Agreement, through the date of Substantial Completion, PCID shall indemnify, defend and hold MARTA and its directors, officers, agents, employees and successors free and harmless from and against any and all liability, loss, cost, claim, demand, damage, or expense of any kind or nature whatsoever (including, without limitation, reasonable attorneys' fees and costs of litigation incurred in defense of such claims) but expressly excluding consequential, special or punitive damages (a "Loss") for (i) any loss of life, bodily injury or personal injury to any persons, and (ii) any loss, damage or destruction of or to any property of any kind or nature, in each case to the extent such Loss arises from any act, omission or neglect of PCID or any of its contractors, subcontractors, agents, and employees pursuant to or in connection with the Construction of the Connection Improvements.

(b) PCID's obligation to indemnify MARTA under this Agreement shall not be limited to the scope and amount of coverage provided by any insurance maintained by PCID, including, without limitation, the insurance required to be maintained by PCID pursuant to this Agreement. PCID's obligation to indemnify MARTA under this Agreement shall be independent of any insurance coverage maintained by PCID or MARTA and MARTA shall have the right to enforce this indemnification without first seeking the benefit of any insurance coverage.

(c) Notwithstanding any provision to the contrary contained in this Agreement, MARTA acknowledges and agrees that PCID's obligations to indemnify and hold harmless MARTA and related parties under this Section 5.1: (i) shall in no event extend to or include any Loss to the extent arising out of any act or any negligent, willful, unlawful conduct or other tortious omission on the part of MARTA or its directors, officers, contractors, agents, and employees, and (ii) is subject to Section 5.6 below.

(d) Prior to Substantial Completion, the terms and provisions of this Section 5.1 shall survive the expiration or earlier termination of this Agreement in respect of Losses arising from events occurring prior thereto. After Substantial Completion, the terms and provisions of this Section 5.1 shall survive the expiration or earlier termination of this Agreement in respect of Losses arising from events occurring prior thereto for the period of the statute of limitations applicable to the Loss.

5.2 Liability Insurance Protection. Through the date of Substantial Completion, at PCID's sole cost and expense, PCID shall obtain and maintain insurance coverage in the amount herein specified under a policy of commercial general liability insurance with a responsible insurance company or companies. Such insurance policy shall have a limit of not less than One Million and 00/100 U.S. Dollars (\$1,000,000.00) per occurrence (which may be achieved by a combination of primary coverage and excess liability coverage) with commercially reasonable deductibles, for all damages arising out of personal or bodily injuries to or the death of one or more persons or arising out of damage to or destruction of property and occasioned by or in connection with any Construction activities of PCID or its contractors, agents, or employees, or any of them in, on, over, across, or beneath MARTA's Property, or any portion thereof. Said insurance policy or policies shall cover MARTA as an additional insured as documented on the certificate of insurance. Any insurance or Self Insured Retention maintained by MARTA shall not be contributory.

5.3 "All Risk" Property Insurance. Until the date of Substantial Completion, at PCID's sole cost and expense, PCID shall obtain and maintain, or cause to be obtained and maintained, a policy or policies of "All-Risk" Builder's Risk coverage during Construction of such Connection Improvements (naming MARTA as an additional insured, as its interest may appear ), covering the Connection Improvements against loss or damage by fire, collapse, earthquake, and other risks now or hereafter customarily embraced by an "all risk" policy, in an amount not less than one hundred (100%) percent of the full replacement cost of the Connection Improvements (excluding site preparation, grading, paving, surface parking lots, foundations and other undersurface installations).

5.4 Worker's Compensation Insurance. While any Construction is being done on MARTA's Property, PCID shall cause its contractors to obtain and maintain, Worker's Compensation insurance as required by Georgia law. In addition, PCID shall cause its general contractors to otherwise fulfill all applicable requirements of the laws of the State of Georgia with respect to Worker's Compensation insurance.

5.5 Delivery of Insurance Certificates. PCID shall, prior to the commencement of any Construction and thereafter upon written request, deliver to MARTA certificates of such insurance on a standard ACORD form evidencing the insurance required to be obtained and maintained by PCID under this Agreement. Valid certificates shall show that: (i) such insurance is in full force and effect in accordance with the provisions of this Agreement; (ii) such insurance is non-cancelable without at least thirty (30) Days' (or at least 10 Days' with respect to any nonpayment of premium) prior written notice to MARTA to the attention of MARTA's Director of Risk Management at MARTA's headquarters building located at 2424 Piedmont Road, Atlanta, Georgia 30324-3330; and (iii) written notice shall be sent to MARTA to the attention of MARTA's Director of Risk Management at least thirty (30) Days prior to any non-renewal of the applicable coverage. Nothing contained in this Article V shall prevent PCID from taking out insurance of the kind and in the amounts provided for in this Article V under a blanket insurance policy or policies that may cover other properties owned or operated by PCID or its affiliates.

5.6 Waiver of Claims. All policies of insurance obtained by either Party covering any or all of MARTA's Property or Connection Improvements shall include a clause or endorsement denying the insurer any rights of subrogation against the other Party to the extent rights have been waived by the insured. With respect to the matters covered under this Agreement by any indemnity: (i) MARTA hereby waives any rights of subrogation or recovery against PCID and PCID's members, agents, employees and other representatives, and (ii) PCID hereby waives any rights of subrogation or recovery against MARTA and its agents, board members, employees and other representatives. In each case the waiver by MARTA and PCID, respectively, extends to a Loss covered (or which should be covered) by the self insurance maintained by a Party or by the liability and property policies of insurance carried by a Party, and in each case to the extent of the Loss covered (or which should have been covered) thereby, and further assuming that any deductible amount shall be deemed to be covered by insurance.

5.7 No Personal Liability.

(a) No director, officer, official or employee of MARTA shall be personally liable to PCID (i) on account of any default or breach by MARTA under this Agreement, (ii) for any amount which is or may become due to PCID under this Agreement, (iii) on any obligations under the terms of this Agreement. PCID shall not collect or attempt to collect any monetary judgment or debt for such matters from the personal assets of any of the director, officer, official or employee of MARTA due to MARTA's failure to comply with, observe or perform any of the terms or conditions of this Agreement.

(b) No member nor any stockholder, director, officer, officials or employee of PCID or its members shall be personally liable to MARTA (a) on account of any default or breach by PCID under this Agreement, (b) for any amount which is or may become due to MARTA under this Agreement, (c) on any obligations under the terms of this Agreement. MARTA shall not collect or attempt to collect any monetary judgment or debt for such matters from the personal assets of any member or of any stockholder, director, officer, official or employee of PCID or its members due to PCID's failure to comply with, observe or perform any of the terms or conditions of this Agreement.

5.8 No Liability for Operation of Transit System. Notwithstanding anything to the contrary set forth in this Agreement, PCID acknowledges and agrees for itself and its members, directors, officers, employees, and agents, and which will be binding on its successors-in-interest under this Agreement, that it may not make any

claim (at law or in equity), cause of action, right or remedy (including, any consequential, special or punitive damages) against MARTA for any circumstance or condition to the extent arising out of or by reason of (i) the general increase in patronage of the Transit System, (ii) the increase in the scope and frequency of the rapid rail system operated by MARTA on MARTA's Property as of the Effective Date to trains of not more than eight (8) cars at a "headway" frequency of not less than ninety (90) seconds, (iii) the introduction of express trains that may not stop at the Dunwoody MARTA station, or (iv) noise, vibration, traffic, congestion or other adverse circumstances or conditions caused by the Transit System, to the extent arising out of or by reason of any change after the Effective Date of this Agreement in the manner, method, mode or means of operation of the Transit System, or the equipment or facilities used therein, either (A) within the Transit System as it exist as of the Effective Date and as it will be modified by any future Transit System modifications, or (B) in connection with any future expansion of the Transit System.

#### 5.9 Casualty.

(a) Casualty during Construction. In case of damage to the Connection Improvements, occurring during Construction, by collapse, earthquake, or any other casualty, PCID shall give prompt notice to MARTA, and PCID shall cause the damaged Connection Improvements to be rendered safe, to the reasonable satisfaction of MARTA, and the damaged Connection Improvements to be repaired promptly at the expense of PCID, whether or not sufficient proceeds from insurance are available to repair or restore the Connection Improvements.

(b) Casualty after Construction. In case of damage to the Connection Improvements, occurring after Substantial Completion, by collapse, earthquake, or any other casualty, the PCID shall cause the damaged Connection Improvements to be rendered safe, to the reasonable satisfaction of MARTA, and the damaged Connection Improvements to be repaired promptly at the expense of MARTA, whether or not sufficient proceeds from insurance are available to repair or restore the Connection Improvements.

### **ARTICLE VI** **OPERATION AND MAINTENANCE**

#### 6.1 Maintenance during Construction

(a) Maintenance by MARTA. During Construction, MARTA agrees to keep and maintain MARTA's Property in good, clean, orderly, safe and sanitary condition; provided, however, that MARTA shall have no obligation to clean those portions of MARTA's Property utilized by PCID for Construction.

(b) Maintenance by PCID. During Construction, PCID shall keep and maintain all areas on MARTA's Property utilized for Construction, in good, clean, orderly, safe and sanitary condition; provided, however, that PCID shall have no obligation to maintain those portions of MARTA's Property not utilized by PCID for Construction. Additionally, PCID shall be solely responsible for maintaining, in good repair and operating condition, any temporary utility facilities and equipment (including, without limitation, water, sewer, gas, electrical) located on the MARTA Property that is used during Construction. MARTA shall notify PCID when any repairs to MARTA's Property are necessary as a result of the act, omission, negligence or tortious act of PCID or its agents, employees and contractors. PCID shall have five (5) Days after receipt of such notice to commence repairs (or such longer time as is reasonably necessary). If PCID does not commence making repairs within five (5) Days (or such longer time as is reasonably necessary) or fails to diligently pursue the same to completion, MARTA may make said repairs at the expense of PCID. PCID shall reimburse MARTA within ten (10) days after written demand for the costs MARTA incurred making repairs in accordance with this Section 6.1.

#### 6.2 Maintenance after Completion of Construction.

(a) Maintenance by MARTA. After the Substantial Completion Date, the City agrees to keep and maintain the Connection Improvements located on MARTA's Property and all appurtenances thereto, in good, clean, orderly, safe and sanitary condition, including, without limitation, the improvements

located within the Permanent Access and Maintenance Easement and maintenance necessary due to normal wear and tear, but excepting routine cleaning and basic maintenance activities.

6.3 Access Easement. No fence, divider, or other structure of any kind shall be placed, kept, stored or maintained in such a manner as to interfere with the pedestrian traffic to and from MARTA's Property and Hammond Drive. MARTA will not obstruct pedestrian traffic from the Connection Improvements except as reasonably necessary for safety and security purposes. Notwithstanding anything to the contrary contained herein, this Section shall not limit MARTA's right to restrict portions of MARTA's Property to patrons who have paid fares, closing entrances during MARTA's non-revenue operating hours, and restricting secure areas to MARTA's contractors, employees and agents. This Agreement shall not prohibit MARTA from periodically closing its property to the public to prevent a dedication of any of the Party's property to the public.

**ARTICLE VII**  
**ASSIGNMENT**

7.1 Assignment. Neither PCID nor City may assign this Agreement without the prior, written approval of MARTA, which may be granted or withheld in MARTA's sole discretion.

**ARTICLE VIII**  
**DEFAULTS**

8.1 Developer Default. Upon the happening of any Event of Default, MARTA has the right, in its sole discretion, to seek the following exclusive remedies: to seek specific performance of Developer's obligations, to sue Developer for any actual damages, or to elect to cure such Default and charge Developer (and Developer shall pay within thirty [30] days after receiving an invoice therefor) for the costs associated with curing such Default. Any one or more of the following events shall constitute an "Event of Default" by Developer under this Agreement:

(a) Developer shall fail to pay any amount when due and such amount remains unpaid following ten (10) Days written notice thereof from MARTA to Developer; or

(b) Developer shall fail or refuse to observe, perform, or comply with any of the other provisions of this Agreement, whether by neglect, inadvertence, intent, and Developer shall fail to cure any such Default within thirty (30) Days after written notice thereof is given by MARTA to Developer; provided, however, that in the case of a Default which cannot be cured solely by the payment of money and which cannot reasonably be cured within the aforesaid thirty (30) Day period, no Event of Default shall be deemed to exist and MARTA may not exercise any of the remedies set forth herein, unless and until Developer shall have failed either to (i) commence action to effect such cure within said thirty (30) Day period or (ii) prosecute diligently and continuously such action until such Default has been cured.

8.2 MARTA Default. Upon the happening of any Event of Default, Developer has the right, in its sole discretion, to seek the specific performance of MARTA's obligations, to sue MARTA for any actual damages, or to elect to (i) terminate this Agreement by giving written notice of such termination to MARTA, or (ii) cure such Default and charge MARTA (and MARTA shall pay within thirty [30] days after receiving an invoice therefor) for the costs associated with curing such Default. Any one or more of the following events shall constitute an "Event of Default" by MARTA under this Agreement:

(a) MARTA shall fail to pay any amount when due and such amount remains unpaid following ten (10) Days written notice thereof from Developer to MARTA; or

(b) MARTA shall fail or refuse to observe, perform, or comply with any of the other provisions of this Agreement, whether by neglect, inadvertence, intent, and MARTA shall fail to cure any such Default within thirty (30) Days after written notice thereof is given by Developer to MARTA; provided, however, that in the case of a Default which cannot be cured solely by the payment of money and which cannot reasonably be cured within the aforesaid thirty (30) Day period, no Event of Default shall be deemed to exist and Developer may not exercise any of the remedies set forth herein, unless and

until MARTA shall have failed either to (i) commence action to effect such cure within said thirty (30) Day period or (ii) prosecute diligently and continuously such action until such Default has been cured.

8.3 Injunctive Relief. Either Party shall further have the right to restrain by injunction any violation or threatened violation of any of the terms, covenants, or conditions of this Agreement and by decree to compel performance of any such terms, covenants, or conditions, it being agreed by Developer and MARTA that the remedy at law for any breach of such term, covenant or condition (except those requiring the payment of actual damages in accordance with express provisions of this Agreement) is not adequate.

8.4 No Waiver of Rights. No failure by any Party hereto to insist upon the strict performance of any of the terms or conditions of this Agreement or to exercise any right or remedy upon a Default hereunder, no acceptance by any Party of partial performance, and no custom or practice of the Parties hereto at variance with the provisions hereof shall constitute a waiver of any such Default or of any of the terms of this Agreement or a waiver of any Party's right to demand exact compliance with the provisions contained in this Agreement. None of the terms of this Agreement to be kept, observed, or performed by any Party and no breach thereof shall be waived, altered, or modified except by a written instrument executed by the Party against whom the waiver is claimed to have been made. No waiver of any breach shall affect or alter this Agreement, but each of the terms and conditions of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach hereunder. No waiver of any Default hereunder by any Party shall be implied from any omission by any other Party to take any action on account of such Default if such Default persists or is repeated, and no express waiver shall affect any Default other than the Default specified in the express waiver for the time period and extent expressly stated therein. One or more waivers shall not be construed as a waiver of a subsequent breach of the same covenant, term or condition. Moreover, MARTA waives no right and accepts no liability by reason of MARTA's review and approval of any of the Plans.

8.5 Remedies Exclusive. The remedies set forth in this Agreement are the exclusive remedies of the Parties. Each Party expressly waives any right to seek or receive consequential, special or punitive damages.

#### **ARTICLE IX** **REPRESENTATIONS AND WARRANTIES**

9.1 Representations and Warranties of MARTA. As material inducements to Developer to enter into this Agreement, MARTA represents and warrants to Developer as follows as of the Effective Date and such representations and warranties will be deemed remade as of the date of commencement of Construction and as of the Substantial Completion Date:

- (a) MARTA has the requisite power and authority to enter into this Agreement, to carry out its obligations in accordance with the terms and conditions hereof.
- (b) This Agreement has been duly executed by duly authorized officer(s) of MARTA.
- (c) MARTA is a public body corporate, validly existing under the laws of the State of Georgia.
- (d) As of the date of this Agreement, there are no actions, suits, or proceedings pending in any court or before any governmental agency, domestic or foreign, which actions, suits, or proceedings, if adjudicated adversely to MARTA, would preclude MARTA's entering into the transactions required by this Agreement.
- (e) Neither the execution and delivery of this Agreement nor performance by MARTA in compliance with the terms of this Agreement will result in a violation of the MARTA Act, as presently constituted, or MARTA's bylaws, as presently constituted, or a breach of the terms and conditions of or constitute a default under any agreement, instrument, undertaking, governmental order, or other restriction or obligation to which MARTA is a party or by which MARTA or its properties or assets are bound.

(f) MARTA has received no written notice from any governmental authority of any pending or threatened: (i) zoning, building, fire, or health code violations or violations of other governmental requirements or regulations with respect to MARTA's Property that have not previously been corrected; (ii) condemnation of MARTA's Property; (iii) violations of any ordinances, orders, regulations or requirements affecting any portion of MARTA's Property.

9.2 Representations and Warranties of City. As material inducements to MARTA and PCID to enter into this Agreement, City represents and warrants to MARTA and PCID as follows as of the Effective Date and such representations and warranties will be deemed remade as of the date of Commencement of Construction and as of the Substantial Completion Date:

(a) The City has the requisite power and authority to enter into this Agreement, to carry out its obligations in accordance with the terms and conditions hereof.

(b) This Agreement has been duly executed by the City or by duly authorized officers, partners, members or managers of the City.

(c) The City is a municipal corporation duly organized, validly existing, and in good standing under the laws of the State of Georgia.

(d) There are no actions, suits, or proceedings pending against, by, or affecting City in any court or before any governmental agency, domestic or foreign, that question the validity of this Agreement or of any action to be taken by City in connection with this Agreement or that might prevent or impede City's consummation of the transactions contemplated by this Agreement.

(e) Neither the execution and delivery of this Agreement nor performance by City in compliance with the terms of this Agreement will result in a breach of the terms and conditions of or constitute a default under the organizational documents of City or of any agreement, instrument, undertaking, governmental order, or other restriction or obligation to which City is a party or by which City or its properties or assets are bound.

9.3 Representations and Warranties of PCID. As material inducements to MARTA to enter into this Agreement, PCID represents and warrants to MARTA as follows as of the Effective Date and such representations and warranties will be deemed remade as of the date of Commencement of Construction and as of the Substantial Completion Date:

(a) PCID has the requisite power and authority to enter into this Agreement, to carry out its obligations in accordance with the terms and conditions hereof.

(b) This Agreement has been duly executed by PCID or by duly authorized officers, partners, members or managers of PCID.

(c) PCID is a Community Improvement District, a governmental entity duly organized and validly existing, pursuant to a Local Law enacted by the Georgia Legislature and in good standing under the laws of the State of Georgia.

(d) There are no actions, suits, or proceedings pending against, by, or affecting PCID in any court or before any governmental agency, domestic or foreign, that question the validity of this Agreement or of any action to be taken by PCID in connection with this Agreement or that might prevent or impede PCID's consummation of the transactions contemplated by this Agreement.

(e) Neither the execution and delivery of this Agreement nor performance by PCID in compliance with the terms of this Agreement will result in a breach of the terms and conditions of or constitute a default under the organizational documents of PCID or of any agreement, instrument, undertaking, governmental order, or other restriction or obligation to which PCID is a party or by which PCID or its properties or assets are bound.

**ARTICLE X**  
**MISCELLANEOUS**

10.1 Estoppel Certificate(s). MARTA and Developer shall execute, acknowledge, and deliver to the other within thirty (30) days after written request a certificate certifying that:

- (a) This Agreement is unmodified and in full force and effect (or, if there have been modifications, that this Agreement is in full force and effect, as modified, and stating the modifications); and
- (b) No notice has been given by MARTA to Developer or by Developer to MARTA of any Event of Default under this Agreement that has not been cured and to the best of its knowledge and belief no default exists (or, if such exists, describing the same); and
- (c) Such other information as a Party may reasonably request.

Certificates from MARTA and Developer pertaining to the aforesaid matters may be relied upon by any existing or prospective assignee of any interest under this Agreement and any lender of any Party. No certificate issued hereunder, however, shall be deemed to affect the rights and obligations of MARTA and Developer between themselves under this Agreement.

10.2 Timing of Consent; Further Assurances. Whenever consent or approval of any Party is required under this Agreement and no other time limit is provided with respect to such consent or approval, such consent or approval shall be deemed to have been given by the Party from whom such consent or approval is sought if that Party does not, within thirty (30) days of the receipt of the written request, give notice that such Party does not consent or approve of the request. Notwithstanding the foregoing, with respect to any consent or approval required during the initial planning, design or construction of the improvements such consent or approval shall be deemed to have been given by the Party from whom such consent or approval is sought if that Party does not, within thirty (30) days of that Party's receipt of the written request for such consent or approval, give notice that such Party does not consent or approve of the request. MARTA and Developer acknowledge and agree that the transactions contemplated by this Agreement are in furtherance of each Party's interest and each Party agrees to execute and deliver such documents, consents and easements as are necessary to effectuate the intent of this Agreement.

10.3 Notices. Any notices required or permitted by this Agreement shall be in writing and sent to the respective Party at the address set forth below. Notice shall be deemed delivered: (a) when delivered by hand or by overnight delivery via a nationally recognized courier service (e.g., Federal Express, UPS, etc.) with signature receipt required; (b) when sent by facsimile with a copy sent by another means specified in this Section; or (c) three (3) days after the date of mailing by United States registered or certified mail, return receipt requested with all postage prepaid. Any Party may change its address for communications by giving notice in accordance with this Section.

MARTA: Metropolitan Atlanta Rapid Transit Authority  
2424 Piedmont Road, NE  
Atlanta, GA 30324-3330  
Attn: Chief Counsel

with a copy to: Metropolitan Atlanta Rapid Transit Authority  
2424 Piedmont Road, NE  
Atlanta, GA 30324-3330  
Attn: Sr. Director of Transit Oriented Development

and: Metropolitan Atlanta Rapid Transit Authority  
2424 Piedmont Road, NE



Atlanta, GA 30324-3330  
Attn: Chief of Corporate Law and Real Estate

PCID: Perimeter Community Improvement Districts  
1100 Abernathy Road, NE  
500 Northpark Lobby Suite 15  
Sandy Springs, GA 30328  
Attention: Chief Program Officer

City: City of Dunwoody  
41 Perimeter Center East  
Suite 250  
Dunwoody, GA 30346  
Attention: Public Works Director

10.4 Effect of MARTA's Review, Objection and Consent of Plans. In no event shall any review, objection, failure to object, approval, non-approval, or consent by MARTA with respect to any act, plan, drawing, specification or proposal of Developer made pursuant to or in compliance with this Agreement constitute (i) an acknowledgement by MARTA of the compliance of any such act, plan, drawing, specification or proposal with applicable laws, (ii) a waiver of any claim or right that MARTA may otherwise have against Developer under this Agreement, or (iii) assumption of responsibility or liability for the adequacy or suitability of any such act, plan, drawing, specification or proposal.

10.6 Severability. In the event that any provision of this Agreement is declared invalid, unenforceable or unlawful, such provision shall be deemed omitted and the remainder of this Agreement shall not be affected and shall continue to be enforceable under Applicable Law. Each covenant and agreement contained in this Agreement shall be construed to be a separate and independent covenant and agreement. The breach of any such covenant or agreement by MARTA or Developer (as the case may be) shall not discharge or relieve Developer or MARTA, respectively, from their respective obligations to perform each and every covenant and agreement of this Agreement to be performed thereby.

10.7 Further Assurances. Each Party shall provide such further documents or instruments required by the other Party as may be reasonably necessary to give effect to this Agreement.

10.8 No Drafting Presumption. No presumption pursuant to any Applicable Law relating to the interpretation of contracts against the drafter shall apply to this Agreement.

10.9 Survival. Any provision of this Agreement which contemplates performance or observance subsequent to the expiration or termination of this Agreement or which must survive in order to give effect to its meaning, shall survive the expiration or termination of this Agreement.

10.10 Independent Developer. The Parties hereto are independent entities and nothing in this Agreement shall be deemed to constitute City, MARTA and PCID (in any combination) as partners, joint venturers, or principal and agent, or be construed as requiring or permitting the sharing of profits or losses. The Parties hereto are independent contractors of each other. No Party has the authority to represent or bind or create any legal obligations for or on behalf of any other Party hereto.

10.11 Third-Party Beneficiaries. This Agreement is not intended, expressly or implicitly, and the Parties agree that it does not confer to any other Person any rights, benefits, remedies, obligations or liabilities.

10.12 Entire Agreement. This Agreement contains the entire understanding and agreement of the Parties relating to the subject matter hereof and supersedes all previous communications, representations, or agreements (whether oral or written) between the Parties with respect to such subject matter. This Agreement may only be amended or modified by a writing executed by each Party's authorized representative and each such writing shall be deemed to incorporate all of the documents attached hereto.

10.13 Gender. Words of any gender used in this Agreement shall be held and construed to include any other gender and words in the singular number shall be held to include the plural, unless the context otherwise requires.

10.14 Exhibits and Attachments. All exhibits, appendices, attachments, riders and addenda attached or referred to in this Agreement are incorporated into this Agreement and made a part hereof for all intents and purposes.

10.15 Time of the Essence: Time is of the essence with regard to each provision of this Agreement.

10.16 Drug-Free Workplace Policy. Developer acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on MARTA's Property or in the performance of any work on MARTA's Property.

10.17 Execution of Agreement and Evidence of Authority.

(a) The execution of this Agreement by MARTA is authorized by Resolution adopted by MARTA's Board of Directors on December 8, 2016.

(b) City represents and warrants to MARTA and PCID that City has full power and authority to enter into this Agreement in all of its various parts, that the individuals and entities executing this Agreement on behalf of City have the authority to bind City to the terms and conditions of this Agreement, that the joinder of no other party is required to permit City to enter into this Agreement or to perform its obligations hereunder.

(c) PCID represents and warrants to MARTA and City that PCID has full power and authority to enter into this Agreement in all of its various parts, that the individuals and entities executing this Agreement on behalf of PCID have the authority to bind PCID to the terms and conditions of this Agreement, that the joinder of no other party is required to permit PCID to enter into this Agreement or to perform its obligations hereunder.

10.18 Attorneys' Fees. In the event of any litigation, administrative proceeding, claim or dispute arising under or in connection with this Agreement, the prevailing party shall be entitled to recover from the other party the expenses of litigation, administrative proceeding, claim or dispute (including reasonable attorneys' fees, expenses and disbursements) incurred by the prevailing party.

10.19 Section Headings. The section headings contained herein are for the convenience of MARTA and Developer and are not to be used to construe the intent of this Agreement or any part thereof, nor to modify, amplify, or aid in the interpretation or construction of any of the provisions thereof.

10.20 Reference to Clause or Section Entitled "\_\_\_\_\_". When reference in this Agreement is made to a specific clause with a specific title set forth in a section heading or section number, such reference will include all sections and subsections of such clause.

10.21 Georgia Open Records Act. Information provided to MARTA, PCID and City may be subject to disclosure under the Georgia Open Records Act, as amended from time to time ("GORA"). PURSUANT TO O.C.G.A. § 50-18-72(A)(34), *an entity submitting records containing trade secrets that wishes to keep such records confidential under this paragraph shall submit and attach to the records an affidavit affirmatively declaring that specific information in the records constitute trade secrets pursuant to Article 27 of Chapter 1 of Title 10 [O.C.G.A § 10-1-760 et seq.]*.

10.22 Applicable Law. This Agreement shall be governed by and construed in accordance with the substantive laws of the State of Georgia without regard to its choice of law principles.

10.23 Jurisdiction and Venue. The Parties hereby submit and consent to the exclusive jurisdiction of the state courts of DeKalb County, Georgia or in the United States District Court for the Northern District of

Georgia and irrevocably agree that all actions or proceedings relating to this Agreement will be litigated in such courts, and each of the Parties waives any objection which it may have based on improper venue or forum *non conveniens* to the conduct of any such action or proceeding in such court.

10.24 Recording. The Parties hereto acknowledge and agree that this Agreement and any modifications hereto will be in writing and will be recorded in the public records by the Clerk of Superior Court of DeKalb County, Georgia. The Parties hereto acknowledge and agree that whenever a reference to MARTA or Developer is made in this Agreement, such reference shall be deemed to include the successors, successors-in-title, and assigns of said Party. This provision is subject to Article VII. On any transfer, Developer will cause a notice to be recorded giving record notice of the new owner and the address for notices to be sent to the new owner.

10.25 Rights Not for Benefit of Public. In no event and under no circumstances whatsoever shall the rights herein granted, or to be granted in the future pursuant to this Agreement, to or for the benefit of MARTA or Developer be deemed to be for the benefit of the public. Said rights and interests herein granted to or for the benefit of MARTA or Developer may be altered, amended, modified, canceled, terminated, and otherwise dealt with by means of an instrument or instruments executed solely by MARTA and Developer, their respective successors and assigns.

10.26 Prohibited Interest. No director, officer or employee of MARTA or of a local public body during his/her tenure or one (1) year thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds thereof. No member of or delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement or to any benefit arising therefrom.

[SIGNATURES BEGIN ON FOLLOWING PAGE]

**IN WITNESS WHEREOF**, the Parties hereto have executed this Agreement on and as of the Effective Date.

**MARTA:**

**METROPOLITAN ATLANTA RAPID  
TRANSIT AUTHORITY,**

a public body corporate created under Georgia Laws 1965,  
pp. 2243, et seq., as amended

Signed, sealed and delivered in the  
in the presence of:

\_\_\_\_\_  
Unofficial Witness

\_\_\_\_\_  
Notary Public

(NOTARY SEAL)

My Commission Expires:

\_\_\_\_\_

By: \_\_\_\_\_

Name: Keith T. Parker

Title: General Manager/CEO

Approved as to legal form:

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

[SIGNATURES CONTINUED ON FOLLOWING PAGE]

[SIGNATURE PAGE CONTINUED FROM PREVIOUS PAGE]

Signed, sealed and delivered in the  
in the presence of:

\_\_\_\_\_  
Unofficial Witness

\_\_\_\_\_  
Notary Public

(NOTARY SEAL)

My Commission Expires:

\_\_\_\_\_

**PCID:**

**PERIMETER COMMUNITY IMPROVEMENT DISTRICTS,**  
a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Attest:

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

[SIGNATURES CONTINUED ON FOLLOWING PAGE]

Signed, sealed and delivered in the  
in the presence of:

\_\_\_\_\_  
Unofficial Witness

\_\_\_\_\_  
Notary Public

(NOTARY SEAL)

My Commission Expires:  
\_\_\_\_\_

**CITY:**

**CITY OF DUNWOODY, GEORGIA,**  
a municipal corporation of the State of Georgia

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Attest:

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

[END OF SIGNATURES]

#7.

**EXHIBIT A**  
**MARTA'S PROPERTY**

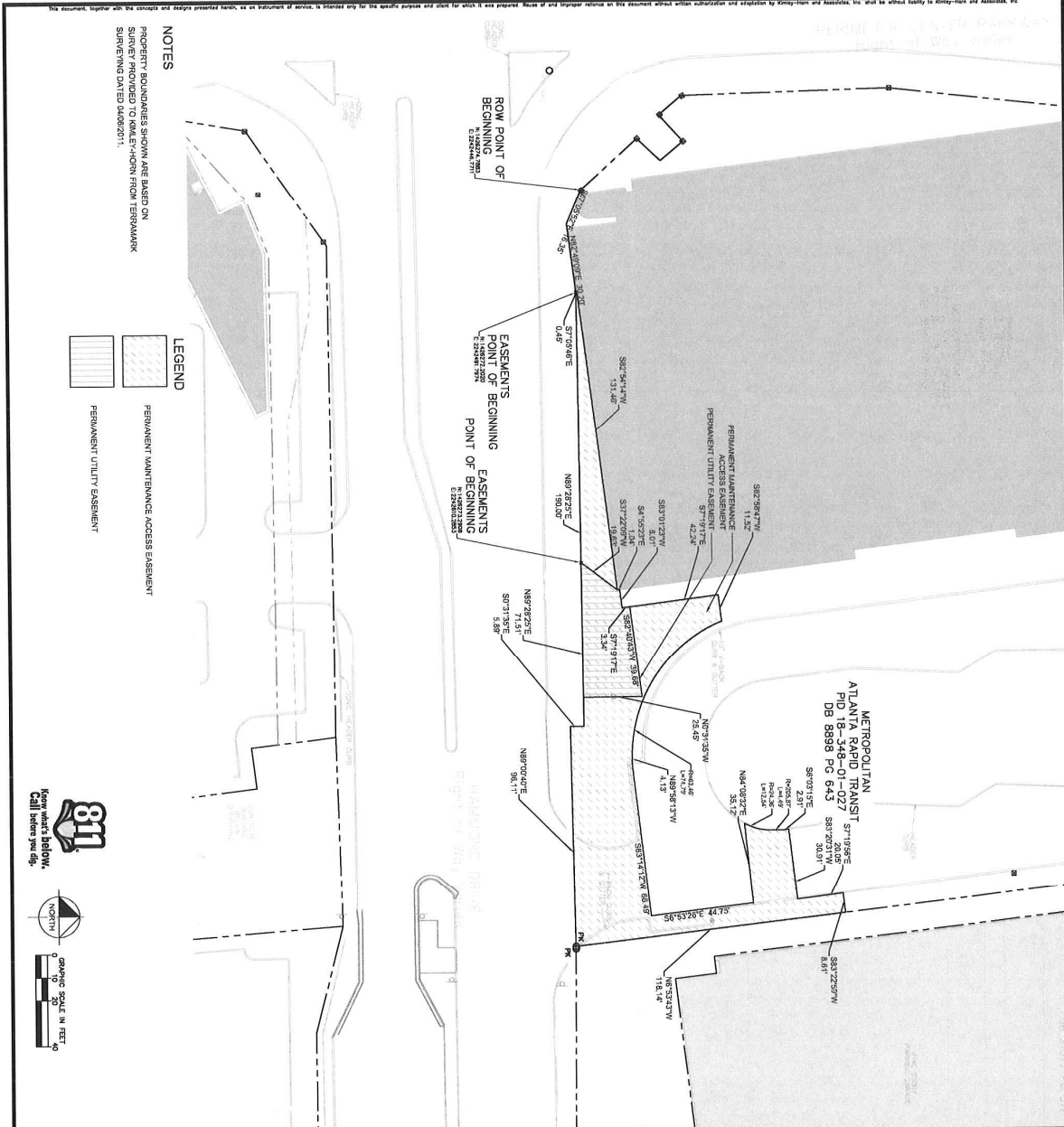
**Legal Description**  
**MARTA Hammond Drive Mid-Block Crossing Improvements Permanent Easement**

All and singular that certain tract of land lying and being in Land Lots 348, 18<sup>th</sup> District, of DeKalb County Georgia, being more particularly described as follows:

COMMENCING at the intersection of the northern right-of-way of Hammond Drive, having a variable right-of-way and the eastern right-of-way of Perimeter Center Parkway, having a variable right-of-way, said point having Georgia State Plane coordinates, Georgia West Zone (NAD83/94), of a northing of 1,426,274.466 and an Easting of 2,242,446.738; THENCE along the right-of-way of Hammond Drive, South 67°08'36" East a distance of 16.35 feet to a point; THENCE continuing along said right-of-way, North 82°46'25" East a distance of 30.20 feet to a point, said point being the POINT OF BEGINNING, having Georgia State Plane Coordinates, Georgia West Zone (NAD83/94), of Northing 1426271.914 and Easting 2242491.764; THENCE leaving said right-of-way, North 07°08'30" West a distance of 0.45 feet to a point; THENCE North 82°51'30" East, a distance of 131.46 feet to a point; THENCE North 04°58'07" West, a distance of 1.04 feet to a point; THENCE North 82°58'39" East, a distance of 8.01 feet to a point; THENCE North 07°22'01" West, a distance of 42.24 feet to a point; THENCE North 82°56'03" East, a distance of 11.52 feet to a point; THENCE along the arc of a curve to the left a distance of 74.79 feet, said curve having a radius of 63.46 feet and a chord bearing of South 56°01'14" East, 70.54 feet, to a point; THENCE North 89°59'03" East, a distance of 4.13 feet to a point; THENCE North 83°11'28" East, a distance of 66.50 feet to a point; THENCE North 06°56'10" West, a distance of 44.75 feet to a point; THENCE South 84°05'48" West, a distance of 34.94 feet to a point; THENCE along the arc of a curve to the left a distance of 12.19 feet, said curve having a radius of 24.36 feet and a chord bearing of North 13°28'42" East, 12.06 feet, to a point; THENCE along the arc of a curve to the left a distance of 4.49 feet, said curve having a radius of 205.87 feet and a chord bearing of North 00°51'45" West, 4.49 feet, to a point; THENCE North 06°05'59" West, a distance of 2.91 feet to a point; THENCE North 83°17'47" East, a distance of 30.91 feet to a point; THENCE North 07°22'40" West, a distance of 20.05 feet to a point; THENCE North 83°20'15" East, a distance of 9.24 feet to a point; THENCE South 07°07'15" East, a distance of 118.28 feet to a point on the right-of-way of Hammond Drive; THENCE continuing along said right-of-way, South 88°58'21" West, a distance of 97.12 feet to a point; THENCE continuing along said right-of-way, North 00°34'19" West, a distance of 5.92 feet to a point; THENCE continuing along said right-of-way, South 89°25'41" West, a distance of 190.00 feet to a point, said point being the POINT OF BEGINNING.

Containing 7,496 square feet or 0.172 acres.





**NOTES**  
 PROPERTY BOUNDARIES SHOWN ARE BASED ON SURVEY PROVIDED TO KIMLEY-HORN FROM TERRAMARK SURVEYING DATED 04/08/2011.

**LEGEND**  
  
 PERMANENT MAINTENANCE ACCESS EASEMENT  
 PERMANENT UTILITY EASEMENT

811  
 Know what's below.  
 Call before you dig.

GRAPHIC SCALE IN FEET  
 0 10 20 30 40

NORTH

**LEGAL DESCRIPTION**  
 LOCATION OF PERMANENT EASEMENTS FROM RIGHT-OF-WAY CORNERS

ALL AND BEING A 34.00' DEPTH TRACT OF LAND MORE OR LESS AS SHOWN IN PLAT OF CITY OF DUNWOODY, GEORGIA, COUNTY OF DEKALB, BEING MORE OR LESS PARCELS 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 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798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

**PERIMETER COMMUNITY IMPROVEMENT DISTRICTS**  
 ONE RAVINIA DRIVE  
 BUILDING ONE, SUITE 1125  
 ATLANTA, GEORGIA 30346

**HAMMOND DRIVE MID-BLOCK CROSSING IMPROVEMENTS**  
 DUNWOODY, GEORGIA

**PERMANENT EASEMENT PLAN**

NO.	REVISIONS	DATE	BY

**Kimley Horn**  
 81 WEST PEACHTREE ST. NW  
 SUITE 601  
 ATLANTA, GEORGIA 30308-1151  
 404.521.4600

SCALE: 1/8" = 1'-0" SHOWN  
 SCALE: 1/4" = 1'-0" SHOWN  
 CHECKED BY: [Name]  
 DATE: [Date]  
 EXHIBIT 1