

**MEMORANDUM OF AGREEMENT
BETWEEN
THE CITY OF SEATTLE
AND
PORT OF SEATTLE
FOR
THE WEST THOMAS STREET OVERPASS PROJECT**

THIS MEMORANDUM OF AGREEMENT (“Agreement”) is entered into by and between The City of Seattle (“City”), a Washington municipal corporation acting by and through the Seattle Department of Transportation (“SDOT”), and the Port of Seattle (“Port”), to document the agreement of the parties related to the use of Port property by the City during construction of its West Thomas Street Overpass Project.

- 1. EFFECTIVE DATE:** This Agreement shall commence on the commencement date of the Temporary Construction Easement the Port is granting to the City for the use of Elliott Bay Park, attached hereto as Exhibit A and incorporated herein by this reference.

- 2. AGREEMENT TERMINATION:** The termination date for this Agreement shall be the same as the termination date of the Temporary Construction Easement. In the event the West Thomas Pedestrian Overpass Project does not commence, as defined herein, City and the Port agree to terminate this Agreement and the corresponding Temporary Construction Easement. For purposes of this paragraph commencement of the Project shall be defined as such time when the City has awarded a contract for construction of the Project and issued a Notice to Proceed to the chosen contractor, and the contractor shall have substantially mobilized on the Project site.

- 3. NO JOINT UNDERTAKING:** Nothing in this Agreement shall be construed to make or render the City and the Port partners, joint ventures or participants in any joint undertaking whatsoever.

- 4. NO THIRD PARTY BENEFICIARIES:** This Agreement is entered into solely for the mutual benefit of the City and the Port. This Agreement is not entered into with the intent that it shall benefit either party’s agents, assigns, consultants or contractors, and no other person or entity shall be a third party beneficiary of this Agreement.

- 5. INDEMNIFICATION:**
 - A.** Port, its Commissioners, officers, employees and agents, shall not be liable for any injury (including death) to any persons or for damage to any property regardless of how such injury or damage be caused, sustained or alleged to have been sustained by the City or by others, including

but not limited to all persons directly or indirectly employed by the City, or any agents, contractors, subcontractors, licensees, or invitees of the City, arising out of or related in any way to this Agreement, or related in any way to the City's use or occupancy of the Park property and of areas adjacent thereto. The City agrees to defend and to hold and save the Port harmless from all liability or expenses (including attorneys' fees, costs, and all expenses of litigation) in connection with any such items of actual or alleged injury or damage, except when such injury or damage is caused by the sole negligence of the Port. *Provided* that to the extent this Agreement is construed to be subject to RCW 4.24.115, and where the injury or damage arises from the concurrent negligence of the Port and the City, the City's indemnity will only extend to its negligence.

B. In any and all claims against the Port by any employee of the City, its agents, anyone directly or indirectly employed by either of them, or anyone for whose acts any of them may be liable, the indemnification obligation of subparagraph A above shall not be limited in any way by any limitation on the amount or type of damages, compensation benefits payable by or for the City, or other person under applicable workers' or workmen's compensation, benefit, or disability laws (including, but not limited to the Industrial insurance laws, Title 51 of the Revised Code of Washington), it being clearly agreed and understood by the parties hereto that the City expressly waives any immunity the City might have had under such laws. By executing this Agreement, the City acknowledges that the foregoing waiver has been mutually negotiated by the parties.

C. The City shall pay all attorneys' fees and expenses incurred by the Port in establishing and enforcing the Port's rights under this paragraph 5, whether or not suit was instituted.

- 6. ASSIGNMENT:** This Agreement shall not be assigned in whole or in part by either party without the prior written approval of the other party.
- 7. PERMITS:** The Port shall grant the City and/or its agents authority to obtain the responsible environmental permit(s) in compliance with all Federal, State and local laws and ordinances in order to construct the proposed new pedestrian overpass as well as for the improvements set forth in SECTION B – PARK IMPROVEMENTS.
- 8. COMPLIANCE WITH THE LAW:** The City and the Port shall comply with all Federal, State and local laws and ordinances.
- 9. SEVERABILITY:** If any provision of this Agreement or any provision of any law, rule or document incorporated by reference into this Agreement shall be held invalid, the invalidity shall not affect the other provisions of this Agreement which legally can be given effect without the invalid provision. To this end, the provisions of this Agreement are declared to be severable.

10. APPLICABLE LAW: This agreement shall be governed by and construed in accordance with the laws of the State of Washington. The jurisdiction and venue of any action brought shall be in the Superior Court of King County.

11. NOTICES: All notices to the parties to this Agreement shall be in writing and addressed to those persons identified in SECTION C – NOTICES.

12. COUNTERPARTS: This Memorandum of Agreement may be executed in any number of counterparts, each of which shall be an original.

13. AMENDMENTS: This Memorandum of Agreement may be amended at any time by written agreement of the parties.

SECTION A – GENERAL INFORMATION

BACKGROUND

In 2004, a plan was conceived to consider providing an alternate pedestrian and bicycle access point into the City - owned Myrtle Edwards Park. The Seattle Parks and Recreation determined that a pedestrian/bicycle overpass was needed in order to provide a direct transit corridor for pedestrians and cyclists from the Lower Queen Anne and Belltown area to Myrtle Edwards Park. Exhibit B shows the layout of the new pedestrian overpass the City will be constructing. Completion of the structure will greatly enhance access into Myrtle Edwards Park.

In order to construct the Project, the City needs a temporary construction easement over portions of Port-owned Elliott Bay Park. The City and the Port wish to document their agreement to have the City carry out certain Park improvements in exchange for the Port granting the City a temporary construction easement.

DEFINITIONS

“Park” shall mean the Port-owned Elliott Bay Park.

“Project” shall mean the West Thomas Pedestrian Overpass project as described in that certain set of drawings, plans and specifications entitled West Thomas Pedestrian Overpass, dated December 2010, prepared by ABKJ and Hewitt without material modification.

“Temporary Construction Easement” shall mean the temporary construction easement the Port will grant to the City over portions of the Park, attached hereto as Exhibit A and incorporated to this Agreement by this reference.

SECTION B – PARK IMPROVEMENTS

For and in consideration of the Port’s grant of a Temporary Construction Easement to the City, attached hereto as Exhibit A attached hereto and incorporated herein by this reference, the City has agreed to

complete certain improvements at Elliott Bay Park as provided below. The Park areas and locations associated with the improvements required under this Section B are depicted in Exhibit C attached hereto and incorporated herein by this reference.

1. **Improvements to existing pedestrian and bicycle asphalt trail** – the City shall repair portions of the asphalt trail designated by the Port, the approximate locations of which are identified on Exhibit C attached hereto and incorporated herein by this reference.
2. **Asphalt improvements to Park parking lot adjacent to Terminal 86** - the City shall place a new asphalt overlay over the Park parking lot located just north of Terminal 86, beginning at the fence defining north edge of Terminal 86 to the existing curb line of the parking lot and from the east curb line of the sidewalk to the entrance to the parking lot. As part of placing the new asphalt overlay, the City will re-paint (i) parking stall delineation lines and (ii) the handicap symbols located on two of the parking stalls.
3. **Paint Park restroom facility** – the City will paint the interior and exterior of the Park restroom facility located just north of the Terminal 86 grain terminal using the paint colors set forth below:
 - *Ceiling Interior* – Parker Paint Marathon Marine Enamel Gloss White
 - *Park Bathroom Doors* – 8156-45199 Industrial Enamel Sherwin Williams
 - *Bathroom Exterior Trim* – 8156-45198 Deep Blue Sea, 4-100 Exterior Ultra Deep Base Satin Latex
 - *Interior/ Exterior Walls* - Sherwin Williams Conflex XL, Extra White /8156-2762
 - *Restroom Interior Floor* – AMERON Amercoat Epoxy Pearl Gray Resin 370/B20130
4. **Restripping the asphalt bicycle path trail** – the City will re-stripe the asphalt bicycle path from the fork located north of the rest rooms to start of the Port owned portion of the park, which is just north of the project site in accordance with the requirements of the *Manual on Uniform Traffic Control Devices* (MUTCD) for reflectivity, adhesion, and texture for the site specific application.
5. **Removal of existing trees** – the City will remove sixteen (16) trees at the Park as identified by the Port. The City shall provide an equivalent number of replacement trees, sixteen (16) in total, with a minimum tree trunk size of 2” caliper. The replacement trees provided by the City shall be as identified below:
 - 3 - *Acer Saccahrum* (“Newton’s Sentry”)
 - 13 - *Acer Rubrum* (“Red Rocket”)

The City shall provide the replacement trees to the Port at the end of the project. The Port shall be responsible for planting and all future maintenance requirements associated with the trees. The Port shall invoice the City and the City shall pay for the Port’s cost of labor and other direct costs directly related to planting the trees. The Port shall designate a Port representative for receipt, inspection and approval of the replacement trees. Once the trees are inspected and accepted by the designated Port representative, the City shall not have any further responsibility for the trees and shall not provide the Port with any written or implied guarantees regarding future establishment of the trees.

6. **Replace Park Benches** – the City shall purchase and install eighteen (18) Park benches to replace damaged Park benches. The Port has requested that thirteen (16) of the benches measure eight

feet (8') in length and the remaining two (2) benches measure six feet (6') in length. The Port selected bench product is Model Number T-3P (RECYCLED PLASTIC IN "WEATHERED WOOD", "GLOSS BLACK", "ZINC COATED"), supplied by FairWeather, or an approved equal.

7. **Picnic tables** – the City shall purchase three (3) Park picnic tables. The Port will be responsible for installation of the picnic tables. The Port has selected the following picnic table product: Model #1ZQ5543 (6' LENGTH, "BROWN"), can be acquired through www.picnictables.com, or an approved equal.
8. **Pre and Post Construction Surveys** – The City shall, at its sole cost and expense, conduct surveys of the Park conditions and improvements (i) prior to commencement of the Temporary Construction Easement and (ii) upon completion of the Project work and improvements required under this Agreement, but prior to termination of the Temporary Construction Easement. The City shall provide the Port with reasonable prior notice of the survey date in order to facilitate Port personnel attendance at the surveys.

SECTION C – NOTICES AND INVOICES

1. **Notice Addressees:** All notices, requests, and other communications under this Agreement shall be writing and shall be delivered through the U.S. Postal Service with postage prepaid as follows:

CITY:

The City of Seattle
Seattle Department of Transportation (SDOT)
700 Fifth Avenue, Suite 3900
P.O. Box 34996
Seattle, WA 98124-4996
Tel: (206) 684-5000
Fax: (206) 614-5180
Attn: Mike Terrell, Director of SDOT-CPRS

Port of Seattle:

Gary Lee
Facilities Maintenance Manager
Port of Seattle - Marine Maintenance
25 S. Horton Street
Seattle, WA 98134
Tel: (206) 787-3654
Fax: (206) 728-3591

2. **Invoices and Payments:** All invoices and payments required under this Agreement and the Temporary Construction Easement (Exhibit A) shall be sent to the following:

Invoices to the City:
Kit Loo, PE

**City of Seattle Department of Transportation
700 Fifth Avenue, Suite 3900
P.O. Box 34996
Seattle, WA 98124-4996**

Payments to the Port:

**Gary Lee
Facilities Maintenance Manager
Port of Seattle - Marine Maintenance
25 S. Horton Street
Seattle, WA 98134
Tel: (206) 787-3654
Fax: (206) 728-3591**

Tay Yoshitani, CEO Port of Seattle

Date:

**Mike Terrell
(SDOT CPRS - Director)**

Date: