

Date May 6, 2013

**APPROVING MAINTENANCE AGREEMENT BETWEEN CITY OF DES MOINES AND
DES MOINES REGIONAL TRANSIT AUTHORITY (DART) FOR PROPERTY
LYING SOUTH OF AND INCLUDING VACATED VINE STREET
BETWEEN 7TH STREET AND 6TH AVENUE**

WHEREAS, the City of Des Moines is the owner of real property (“Maintained Premises”) lying south of and including a portion of vacated Vine Street between 7th Street and 6th Avenue; and

WHEREAS, Des Moines Regional Transit Authority (DART) has installed landscaping within the Maintained Premises pursuant to a temporary right-of-entry granted by City to DART on November 19, 2011, and a short-term lease agreement entered into by City and DART on September 20, 2012, associated with planned redevelopment of real property locally known as 620 Cherry Street for the DART Central Station; and

WHEREAS, City granted the temporary right-of-entry and short-term lease to DART in reliance upon DART’s stated intention to enter into a long-term lease with City for the Maintained Premises, however DART has now requested and City staff have agreed that a Maintenance Agreement be negotiated in lieu of a long-term lease; and

WHEREAS, pursuant to the Maintenance Agreement, in exchange for and in consideration of the permission granted to DART for installation of the landscaping within the Maintained Premises as requested by DART, DART, at its sole cost and expense which is not anticipated to exceed \$25,000 annually, is required to maintain said landscaping for an initial term of twenty (20) years with successive five-year renewal terms, subject to a 90-day termination option by either party at any time and for any reason; and

WHEREAS, approval of the proposed Maintenance Agreement between the City and DART, now on file with the City Clerk’s office, is in the best interest of the City.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Des Moines, Iowa, that:

1. The proposed Maintenance Agreement between the City of Des Moines and DART for property located south of and including a portion of vacated Vine Street between 7th Street and 6th Avenue, be and is hereby approved.
2. The Mayor is authorized and directed to sign the Maintenance Agreement and the City Clerk is authorized and directed to attest the Mayor’s signature.
3. The City Manager and/or his designee, the City’s Real Estate Division Manager, is hereby authorized and directed to administer and monitor the Maintenance Agreement; to approve and execute documents pertaining to minor or unsubstantial changes to said Agreement, following approval of the

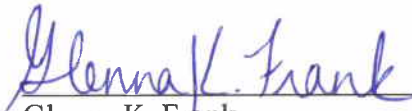
Date May 6, 2013

City's Legal Department as to form; and, if needed, to proceed with and execute documents pertaining to the termination of the Agreement, following approval of the City's Legal Department as to form.

4. The City Clerk is authorized and directed to forward the original of said Maintenance Agreement to the Real Estate Division of the Engineering Department, and upon receipt, the Real Estate Division Manager shall mail a fully executed copy of the document to DART.

Moved by _____ to adopt.

APPROVED AS TO FORM:


 Glenna K. Frank
 Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GRIESS				
HENSLEY				
MAHAFFEY				
MEYER				
MOORE				
TOTAL				
MOTION CARRIED			APPROVED	

CERTIFICATE

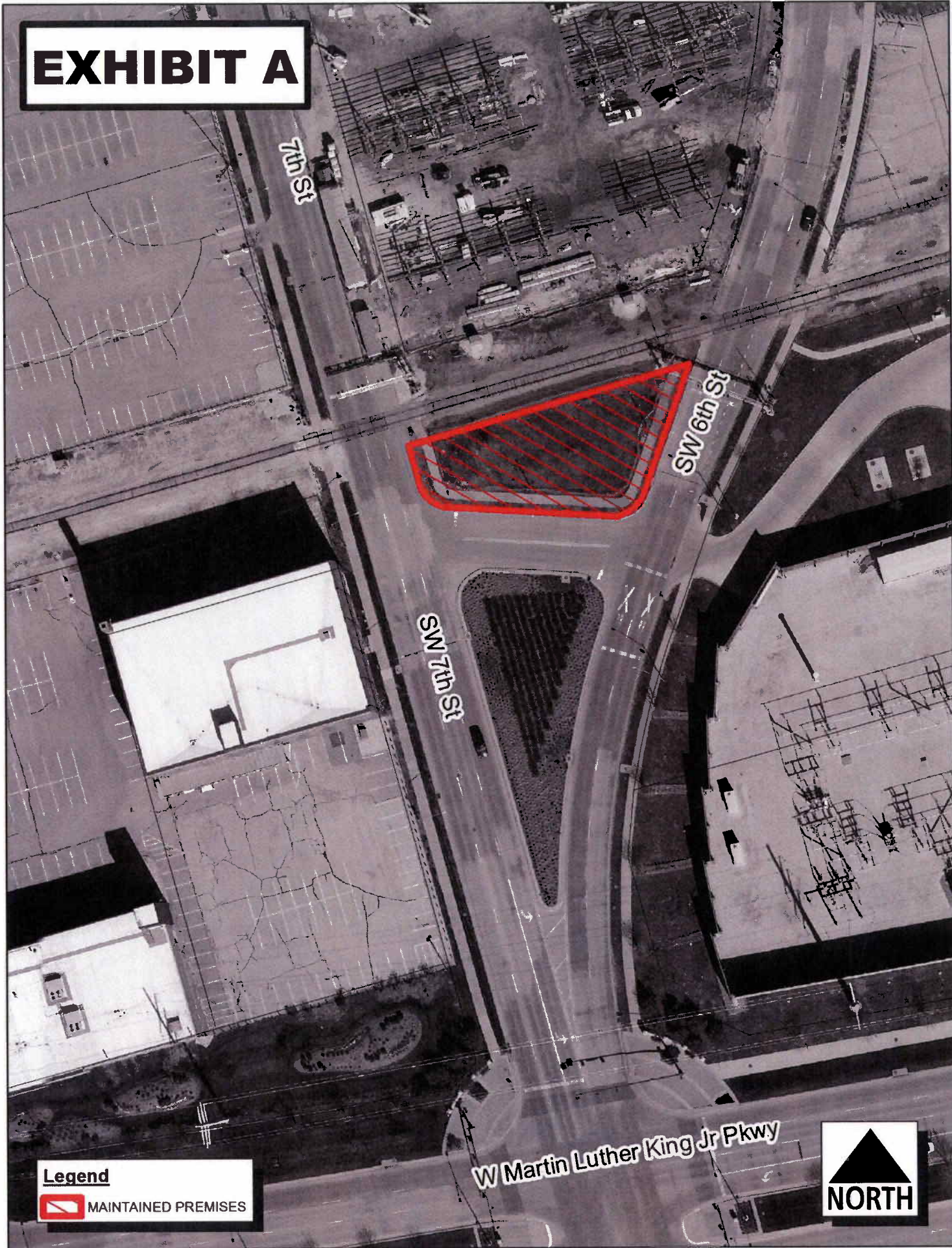
I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

 Mayor

 City Clerk

EXHIBIT A



Legend



MAINTAINED PREMISES



MAINTENANCE AGREEMENT

Activity ID – 32-2010-002

THIS MAINTENANCE AGREEMENT is made and entered into this _____ day of _____, 2013, by and between the CITY OF DES MOINES, IOWA, a municipal corporation, hereinafter referred to as CITY, and DES MOINES REGIONAL TRANSIT AUTHORITY (a/k/a DART), hereinafter referred to as DART.

WHEREAS, CITY is the titleholder of certain real estate (“Maintained Premises”) lying south of and including a portion of vacated Vine Street between 7th Street and 6th Avenue, Des Moines, Iowa, as generally depicted on the attached aerial exhibit; and

WHEREAS, DART has installed landscaping within the Maintained Premises pursuant to a temporary right-of-entry granted by CITY to DART on November 19, 2011, and a short-term lease agreement entered into by CITY and DART on September 20, 2012, associated with planned redevelopment of real property locally known as 620 Cherry Street (“adjoining property”) for the DART Central Station; and

WHEREAS, CITY granted the temporary right-of-entry and short-term lease to DART in reliance upon DART’s stated intention to enter into a long-term lease with CITY for the Maintained Premises, however DART has now requested that a Maintenance Agreement be negotiated in lieu of a long-term lease; and

WHEREAS, in exchange for and in consideration of the permission granted to DART for installation of the landscaping within the Maintained Premises as requested by DART, DART is required to maintain the landscaping that DART has installed within the Maintained Premises pursuant to the provisions set forth in this Maintenance Agreement.

NOW, THEREFORE, in consideration of the mutual covenants, promises, and agreements hereinafter set forth, CITY and DART (each a “party” and collectively, “the parties”) agree as follows:

1. TERM OF MAINTENANCE AGREEMENT; TERMINATION.

A. Term. This Maintenance Agreement shall exist for an initial term of twenty (20) years from January 1, 2013 to December 31, 2032. Thereafter, this Maintenance Agreement shall renew for successive five-year terms without any further action by CITY or DART, unless either party shall notify the other party in writing of non-renewal not later than ninety (90) days prior to the commencement of the next renewal term.

B. Termination. Either party may terminate this Maintenance Agreement at any time, with or without cause and for any reason whatsoever, upon ninety (90) days written notice to the other party in the manner provided below for notice to said party. In the event of termination by CITY, DART shall not be entitled to any damages or compensation for work performed or improvements made to the Maintained Premises.

2. MAINTENANCE OBLIGATIONS. Within the Maintained Premises, and adjoining the Maintained Premises if so specified, DART, at its sole cost and expense, shall for the duration of this Maintenance Agreement provide the following:

- a. Plant, water and maintain all landscaping. Frequency: As needed, but no less than once per week during the months of April-October each year.
- b. Obstruction, litter, waste and debris removal. Frequency: As needed, but no less than once per week.
- c. Weed control for landscaping and concrete surfaces. Frequency: As needed, but no less than once per week during the months of April-October each year.
- d. Pruning of plant materials. Frequency: As needed, but no less than twice per year.
- e. Pest control for all landscaping. Frequency: As needed, but no less than twice per year.
- f. Keep the Maintained Premises clean, neat and in good condition, and not permit or allow the Maintained Premises to be materially damaged or materially depreciate in value, ordinary wear and tear excepted.
- g. Replace any damaged, dying or dead landscaping with new plantings. Frequency: As needed. DART's planting plans require the prior written approval of the City Engineer. No significant changes will be made to the landscaping prior to City Engineer review and approval.
- h. Operate, maintain, repair, and replace when needed, any existing irrigation or hydration equipment within the Maintained Premises.

3. USE OF MAINTAINED PREMISES. This Maintenance Agreement and use of the Maintained Premises by DART shall be subject to the following usage requirements:

A. DART agrees to use the Maintained Premises for the purpose of maintenance of landscaping associated with redevelopment of the adjoining property. DART warrants that it has visually inspected the Maintained Premises and found the Maintained Premises acceptable for DART's required usage.

B. DART shall (1) not use or allow usage of the Maintained Premises for any purpose other than that set forth in this Maintenance Agreement; (2) not conduct any activity within or upon the Maintained Premises that will produce any hazardous substance or permit any such substance to be brought upon the Maintained Premises, and if so brought thereon, the same shall be immediately removed, with proper disposal, and all required clean up procedures shall be diligently undertaken pursuant to all federal and state environmental laws, rules and regulations; and (3) not allow others acting by or on behalf of DART to act in contradiction of these terms of usage, and shall be responsible for terminating said contradictory usage and/or immediately notifying CITY of such contradictory usage in order to allow CITY to terminate said usage. DART shall allow no nuisances to exist on the Maintained Premises.

C. In its performance of this Maintenance Agreement, DART agrees to comply at all times during the term of this Maintenance Agreement, and at DART'S own cost and expense, with all ordinances and regulations of CITY and Polk County and the laws of the State of Iowa and Federal Government, and

DART shall not allow any illegal activity to be conducted, operated, or to occur on the Maintained Premises by anyone acting by or on behalf of DART. DART shall further comply with the provisions of the Iowa Smokefree Air Act, Iowa Code Chapter 142D, and the administrative rules promulgated to implement the Iowa Smokefree Air Act, and with the Americans with Disabilities Act and any amendments, implementing regulations and guidelines thereto, and with CITY's ADA Transition Plan and with any U.S. Department of Justice agreements or orders, with regard to DART's use of the Maintained Premises.

D. DART agrees that CITY shall not be responsible, or be in any way liable, for any damages sustained as a result of DART's use of the Maintained Premises or the use thereof by DART's contractors, subcontractors, invitees, guests, agents, or any other party. DART acknowledges and accepts full responsibility for the security and protection of all landscaping located within the Maintained Premises and for reasonable efforts to prevent unauthorized access to such property or the Maintained Premises.

4. FORCE MAJEURE. No party shall be responsible for events that are unforeseeable and/or beyond its reasonable control, such as Acts of God, weather delays, governmental restrictions or unforeseen commercial delays. No acts or omissions arising out of, associated with or resulting from DART's use of the Maintained Premises or the use thereof by DART's invitees, guests, agents or any other party shall be considered unforeseen as used in this Paragraph.

5. CONDITION AT END OF MAINTENANCE AGREEMENT. Upon termination of this Maintenance Agreement, the Maintained Premises shall remain in its then-current condition (e.g., DART will leave the landscaping improvements in place for use by CITY and will not re-install sidewalks). In the event that DART fails to remove any permitted personal property other than landscaping improvements from the Maintained Premises within fifteen (15) days following termination or expiration of this Maintenance Agreement, said personal property shall be deemed abandoned by DART and under the possession and ownership of CITY and CITY may remove, dispose of or use said personal property in any manner that CITY, at its sole discretion, so chooses, and may charge any costs to DART for disposition of said property.

6. ACCESS AND EASEMENTS. During the term of this Maintenance Agreement, the Maintained Premises shall remain subject to the following access rights: (1) CITY shall have the right to enter upon and make improvements to the Maintained Premises if so desired by CITY for any purpose, and/or if so required in accordance with CITY's ADA Transition Plan and/or with any U.S. Department of Justice agreements or orders, without liability to DART for such right of entry, and (2) any and all easements for existing utilities, restrictions and covenants of record on the Maintained Premises, and any easement upon the Maintained Premises for the continued use and maintenance of any and all public utilities now in place, including but not limited to those for the benefit and use of CITY, with the right of entry to CITY, its authorized agents, contractors, employees, assigns, and other public utility agencies for servicing same shall remain in place.

7. DEFAULT; REMEDIES. In the event that either party determines that the other has defaulted or is defaulting in performance of its obligations hereunder, the aggrieved party may declare that default has occurred and give notice thereof to the defaulting party, in writing, providing thirty (30) calendar

days for the defaulting party to comply with this Maintenance Agreement and correct the default. If, at the end of the thirty (30) calendar-day notice period, the default has not, in the opinion of the aggrieved party, been corrected, that party may pursue remedies including but not limited to (a) performing or causing to be performed the obligations of the defaulting party and billing the other party for the cost thereof, which bill and/or invoice shall be due within thirty (30) days of the date stated therein, (b) seeking specific performance of this Maintenance Agreement, and/or (c) seeking monetary damages related to this Maintenance Agreement.

8. GOVERNING LAW, ATTORNEY FEES AND COURT COSTS. This Maintenance Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Iowa. In any litigation or other proceeding by which one party seeks to enforce its rights under this Maintenance Agreement or seeks a declaration of any rights or obligations under this Maintenance Agreement, the prevailing party shall be awarded its reasonable attorneys' fees and costs and expenses incurred. The rights and remedies of the parties, whether provided by law or this Maintenance Agreement, shall be cumulative, and the parties shall have the right to institute such actions as they deem desirable for enforcing the terms of this Maintenance Agreement, and the exercise by a party of any one or more remedies shall not preclude the exercise by a party, at the same or different times, of any other such remedies for the same default or breach by such party.

9. NONWAIVER OF RIGHTS. No waiver of default by either party of any of the terms, covenants, and conditions hereof to be performed, kept, and observed by the other party shall be construed as, or shall operate as, a waiver of any subsequent default of any of the terms, covenants, or conditions herein contained, to be performed, kept, and observed by the other party.

10. SEVERABILITY. If one or more clauses, sections, or provisions of this Maintenance Agreement, or the application thereof, shall be held to be unlawful, invalid, or unenforceable, the remainder of this Maintenance Agreement and application of its remaining provisions will not be affected, unless this Maintenance Agreement without the unenforceable provision(s) fails in its essential purpose.

11. CO-PARTNERSHIP DISCLAIMER. It is mutually understood that nothing in this Maintenance Agreement is intended or shall be construed as in any way creating or establishing a partnership between the parties hereto for purposes of this Maintenance Agreement, or as constituting either party as an agent or representative of the other party for any purpose or in any manner whatsoever.

12. ENTIRE AGREEMENT; CHANGES IN TERMS. No act of either party, or both parties, shall be construed as an extension of this Maintenance Agreement, or any change in the terms and provisions, unless changes are reduced to writing and signed by duly authorized representatives of both parties as an amendment to this Maintenance Agreement.

13. INDEMNIFICATION AND INSURANCE. DART shall defend, pay on behalf of, indemnify and hold harmless CITY, its elected and appointed officials, employees and volunteers, and others working on behalf of CITY, as provided for in Attachment A. DART shall obtain and maintain in continuous effect during the term of this Maintenance Agreement with CITY and while any of its obligation remain

unsatisfied, self-insurance and/or the insurance coverages, limits and endorsements set forth in Attachment A. CITY reserves the right to require and enforce future revisions to the insurance requirements in Attachment A, and DART agrees to abide by reasonable future revisions upon notice thereof. DART shall require that any of its agents, contractors, or subcontractors who perform work and/or services pursuant to this Maintenance Agreement meet the same insurance requirements as are required of DART. A Certificate of Insurance and/or letter of self-insurance citing such coverages, limits and endorsements shall be provided to CITY on an annual basis for the duration of this Maintenance Agreement.

14. NOTICES. Notices to CITY pursuant to this Maintenance Agreement shall be deemed sufficient if sent by regular and certified mail to City of Des Moines, Real Estate Division Manager, 400 Robert D. Ray Drive, Des Moines, IA 50309. Notices to DART under this Maintenance Agreement shall be deemed sufficient if sent by regular and certified mail to Des Moines Regional Transit Authority, c/o General Manager, 620 Cherry Street, Des Moines, Iowa 50309 with a copy to Brick Gentry P.C., Attn: Nolden Gentry, 6701 Westown Parkway, Suite 100, West Des Moines, Iowa 50266.

15. ADDITIONAL PROVISIONS. A. Neither DART nor anyone claiming by, through or under DART shall have the right to file or place any mechanics' lien or other lien of any kind upon the Maintained Premises, and DART shall give prior actual notice of this restriction to any and all contractors and/or subcontractors who may furnish or agree to furnish any material, service or labor for the Maintained Premises. In the event that, regardless of this prohibition, such a lien is placed upon the Maintained Premises, DART, at its sole expense, shall cause said lien to be satisfied of record, or shall cause the Maintained Premises and improvements thereto to be released from the lien by the posting of a bond or other security as prescribed by law, or shall cause the same to be discharged as a lien against the Maintained Premises and improvements thereon by order of court having jurisdiction to discharge such lien.

B. Utilities. DART shall furnish and pay, at its sole expense, all charges and connection costs relating to all utilities of every kind and nature as required for the intended purpose of this Maintenance Agreement. CITY shall not be responsible for furnishing such utilities in connection with the Maintained Premises, and shall not be liable for any interruption of such utilities. DART shall further be responsible for payment of any utility bills that accrue during DART's use of the Maintained Premises prior to termination of this Maintenance Agreement that are billed following such termination. DART shall not place or allow placement of utility facilities within the Maintained Premises without prior written approval by CITY and compliance with CITY's Right-of-Way Management Code, and DART shall pay CITY for the cost of any damage to the Maintained Premises caused by the installation and/or removal of such facilities, as determined by CITY.

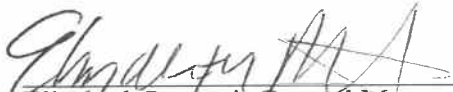
C. Council Approval. This Maintenance Agreement is subject to the approval of CITY's City Council and neither CITY nor its representatives in this matter shall be bound by the Maintenance Agreement until said approval is given and is public record.

[Signature Page Follows.]

IN WITNESS WHEREOF, the parties hereto have duly executed this Maintenance Agreement, on the day and year first above-written.

DART
DES MOINES REGIONAL TRANSIT
AUTHORITY

CITY
CITY OF DES MOINES, IOWA


Elizabeth Presutti, General Manager

T. M. Franklin Cownie, Mayor

ATTEST:

Diane Rauh, City Clerk

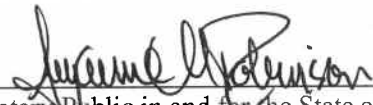
Approved as to form:



Glenna K. Frank
Assistant City Attorney

STATE OF IOWA)
) ss:
COUNTY OF POLK)

This instrument was acknowledged before me on April 25, 2013, by Elizabeth Presutti as General Manager of Des Moines Regional Transit Authority.



Notary Public in and for the State of Iowa

STATE OF IOWA)
) ss:
COUNTY OF POLK)



On this _____ day of _____, 2013, before me, the undersigned, a Notary Public, personally appeared T.M. Franklin Cownie and Diane Rauh, to me personally known, who, being by me duly sworn, did state that they are the Mayor and City Clerk, respectively, of the City of Des Moines, Iowa; that the seal affixed to the foregoing instrument is the seal of the corporation, by authority of its City Council, as contained in the Resolution adopted by the City Council on the _____ day of _____, 2013, and that T. M. Franklin Cownie and Diane Rauh acknowledge the execution of the instrument to be the voluntary act and deed of the municipal corporation, by it voluntarily executed.

Notary Public in the State of Iowa

ATTACHMENT 1

CITY OF DES MOINES, IOWA STANDARD - MINOR

INSURANCE & INDEMNIFICATION REQUIREMENTS

For purposes of this Attachment and all provisions included herein, the term "Contractor" means and includes the Des Moines Regional Transit Authority (DART), its officers, agents, employees, contractors, subcontractors, and others under the control of Contractor. The term "CITY" means the City of Des Moines, Iowa including its elected and appointed officials, agents, employees and volunteers.

1. GENERAL

The Contractor shall purchase and maintain insurance to protect the Contractor and CITY throughout the duration of the Maintenance Agreement. Said insurance shall be provided by insurance companies "admitted" or "nonadmitted" to do business in the State of Iowa having no less than an A. M. Best Rating of "B+." All policies shall be written on an occurrence basis and in form and amounts satisfactory to CITY. Certificates of Insurance confirming adequate insurance coverage shall be submitted to CITY prior to Maintenance Agreement execution or commencement of work and/or services.

2. INSURANCE REQUIREMENTS

A. WORKER'S COMPENSATION & EMPLOYER'S LIABILITY INSURANCE: The Contractor shall procure and maintain Worker's Compensation Insurance, including Employer's Liability Coverage, both written with State of Iowa statutory limits. ***Waiver of Subrogation in favor of CITY is required.***

B. COMMERCIAL GENERAL LIABILITY INSURANCE: The Contractor shall procure and maintain Commercial General Liability insurance on an occurrence basis with limits of liability not less than \$1,000,000 per occurrence and aggregate combined single limit covering Personal Injury, Bodily Injury and Property Damage. Coverage shall include: (a) Contractual Liability, (b) Premises and Operations, (c) Products and Completed Operations, (d) Independent Contractors Coverage, (e) Personal and Advertising Injury and (f) Explosion, Collapse and Underground- XCU (when applicable). ***Waiver of Subrogation in favor of CITY is required.***

Coverage shall be no less comprehensive and no more restrictive than the coverage provided by ISO standard Commercial General Liability Policy form ISO CG 0001 including standard exclusions or a non-ISO equivalent form.

C. CONTRACTUAL LIABILITY: The General Liability Insurance policy shall include Contractual Liability coverage equivalent to that included in ISO standard form CG 0001. CITY shall not be included as an Additional Insured.

D. CANCELLATION & NONRENEWAL NOTIFICATION ENDORSEMENT: The General Liability Insurance policy shall be endorsed to provide CITY with no less than thirty (30) days Advance Written Notice of Cancellation, forty-five (45) days Advance Written Notification for Nonrenewal and

ten (10) days Written Notification of Cancellation due to non-payment of premium. **Written notifications shall be sent to: City Real Estate Division Manager, City Hall, 400 Robert D. Ray Drive, Des Moines, Iowa 50309.**

- E. WAIVER OF SUBROGATION: To the fullest extent permitted by law, Contractor hereby releases CITY, including its appointed officials, agents, employees and volunteers and others working on its behalf, from and against any and all liability or responsibility to the Contractor or anyone claiming through or under the Contractor by way of subrogation or otherwise for any loss without regard to the fault of CITY or the type of loss involved including loss due to occupational injury. This provision shall be applicable and in full force and effect only with respect to loss or damage occurring during the term of the Maintenance Agreement. The Contractor's policies of insurance shall contain either a policy provision or endorsement affirming the above stated release in favor of CITY.
- F. PROOF OF INSURANCE: The Contractor shall provide to CITY Certificates of Insurance evidencing all insurance coverage as required in paragraphs A through E above utilizing the latest version of the ACORD form. The Certificate(s) of Insurance shall specify the Title of the contract or agreement under "Description of Operations/ Locations/ Vehicle/Special Items". A Copy of the Cancellation and Nonrenewal Notification Endorsement shall be submitted with the Certificates of Insurance. **Mail Certificates of Insurance to: City Real Estate Division Manager, City Hall, 400 Robert D. Ray Drive, Des Moines, Iowa 50309.**
- G. AGENTS AND SUBCONTRACTORS: The Contractor shall require that any of its agents and subcontractors who perform work and/or services on behalf of the Contractor purchase and maintain the types of insurance customary for the services being provided.

3. INDEMNIFICATION REQUIREMENTS

To the fullest extent permitted by law, Contractor agrees to defend, pay on behalf of, indemnify, and hold harmless CITY against any and all claims, demands, suits, damages or losses, together with any and all outlay and expense connected therewith including, but not limited to, attorneys' fees and court costs that may be asserted or claimed against, recovered from or suffered by CITY by reason of any injury or loss including, but not limited to, personal injury; including bodily injury or death, property damage; including loss of use thereof, and economic damages that arise out of or are in any way connected or associated with Contractor's work.

Contractor's obligation to indemnify CITY contained in this Maintenance Agreement is not limited by the amount or type of damages, compensation or benefits payable under any workers' compensation acts, disability benefit acts, or other employee benefits acts.

CITY shall not be liable or in any way responsible for any injury, damage, liability, claim, loss or expense incurred by Contractor arising out of or in any way connected or associated with Contractor's work, except to the extent caused by or resulting from the negligence of CITY.

Contractor expressly assumes responsibility for any and all damage caused to CITY property arising out of or in any way connected or associated with Contractor's work.

Contractor shall ensure that its activities on CITY property will be performed and supervised by adequately trained and qualified personnel and Contractor will observe all applicable safety rules.