

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 7<sup>TH</sup> STREET AND 6<sup>TH</sup> 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 7<sup>th</sup> Street and 6<sup>th</sup> 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 7<sup>th</sup> Street and 6<sup>th</sup> 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

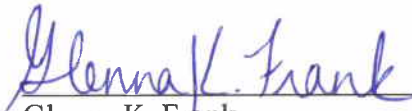
Date May 6, 2013

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**

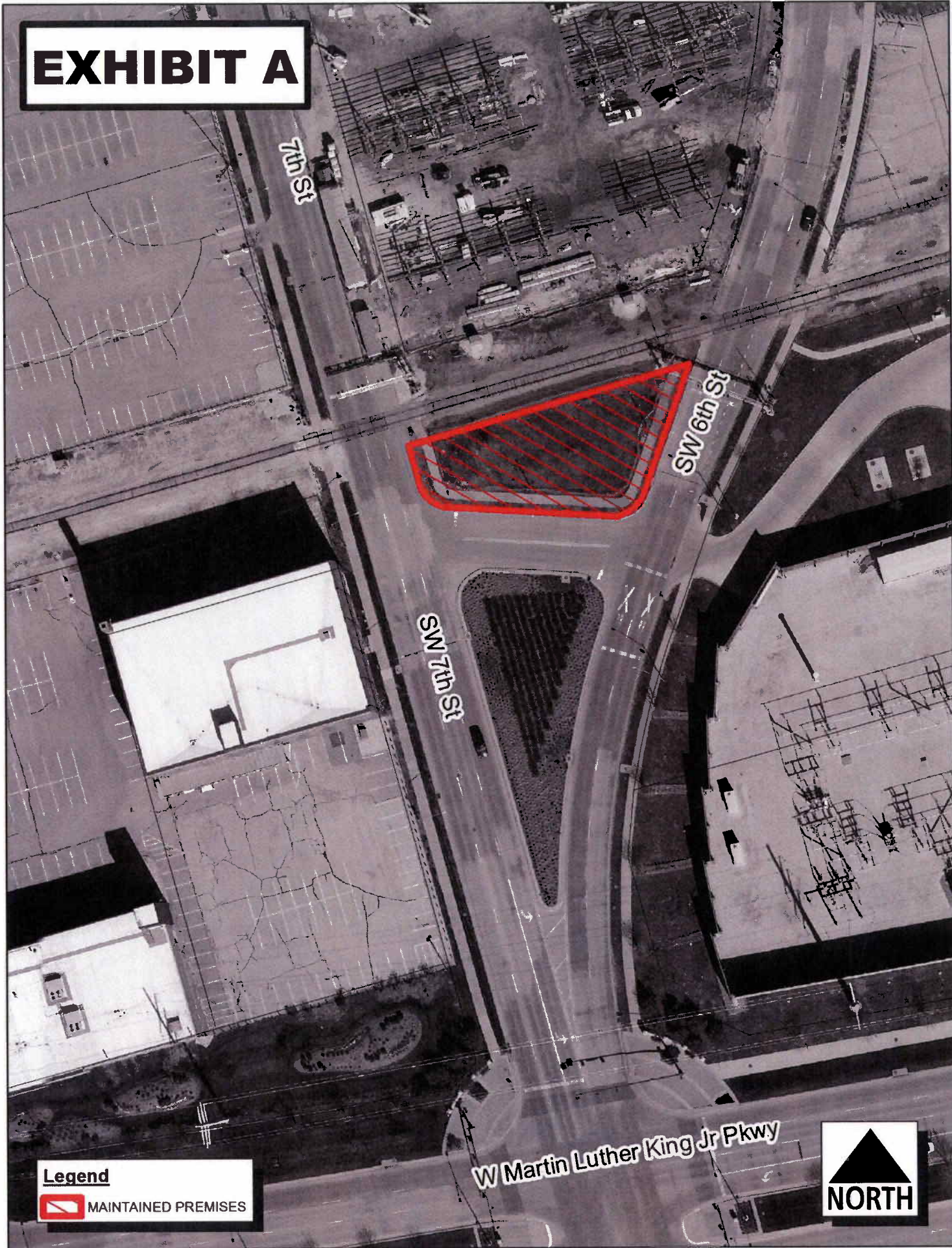
I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

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 7<sup>th</sup> Street and 6<sup>th</sup> 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

