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**REGIONAL TRANSIT PROJECT FUNDING AGREEMENT**

By and Between

METROPOLITAN TRANSPORTATION COMMISSION,

And

BAY AREA INFRASTRUCTURE FINANCING AUTHORITY

Dated as of [\_\_\_\_\_] 1, 2023

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# REGIONAL TRANSIT PROJECT FUNDING AGREEMENT

This **Regional Transit Project Funding Agreement** (“Agreement”) is made and entered between the **Metropolitan Transportation Commission** (“MTC”) and the **Bay Area Infrastructure Financing Authority** (“BAIFA” and, together with MTC, the “Parties”).

## RECITALS

MTC is the regional transportation planning agency for the nine-counties of the San Francisco Bay Area (“Bay Area Region”) pursuant to Sections 66500 et seq. of the California Government Code (“Government Code”); and

MTC is the designated “metropolitan planning organization” for the Bay Area Region (the “Bay Area MPO”), and is required to prepare, adopt, and periodically revise, pursuant to Sections 66508 and 65080 of the Government Code, a “regional transportation plan” (“RTP”); and

Pursuant to Section 450.300 of Title 23 of the Code of Federal Regulations, the Bay Area MPO is required to carry out a continuing, cooperative, and comprehensive transportation planning process as a condition to receiving federal assistance, resulting in the development of and updates to a “transportation improvement program” (“TIP”) that is consistent with the RTP, and which consists of a comprehensive listing of transportation projects that receive federal funds, including from the Federal Transit Administration (“FTA”), that are subject to a federally-required action, or that are regionally significant; and

MTC has been designated by the Governor of the State of California, with concurrence from the FTA, as the designated recipient of FTA Formula Funds (defined herein) for certain urbanized areas in the Bay Area Region, which for purposes of the financing authorized by the MTC LONP (defined herein) include the Antioch, Concord-Walnut Creek, Livermore-Pleasanton-Dublin and San Francisco-Oakland urbanized areas (“Participating UZAs”); and

Pursuant to Section 5303 of Chapter 53 of Title 49 of the United States Code, MTC receives and apportions FTA Formula Funds in accordance with Section 5336 of Chapter 53 of Title 49 of the United States Code to the Participating UZAs for eligible projects included in the TIP (“Eligible Projects”); and

To carry out the Eligible Projects, MTC programs FTA Formula Funds apportioned by the FTA to the Participating UZAs for the Eligible Projects and directs transit operators in the Participating UZAs to apply to FTA for such funds subject to concurrence from MTC; and

BART (as defined herein), through its rail car replacement program, has contracted for the acquisition of up to 669 replacement railcars, as further described in Exhibit A to the BART T&R Project Funding Agreement (as defined herein) (the “BART Project”), which is the only Eligible Project authorized to benefit from the financing contemplated by the MTC LONP (defined herein); and

As previously expressed in MTC Resolution No. 4123 and MTC Resolution No. 4126, Revised, MTC desires to assist BART in obtaining funds as required for the BART Project; and

In order to meet the delivery schedule for the BART Project, which will benefit the transportation network in the Bay Area Region, MTC desires to make more immediate funding available to BART, who has requested financial assistance for the BART Project; and

MTC has requested assistance from BAIFA to support MTC's regional transportation planning process by facilitating the financing and refinancing of all or a portion of the costs of the BART Project by providing funds to BART, including, as applicable, from the proceeds of BAIFA Obligations (defined herein); and

Pursuant to this Agreement and consistent with the MTC LONP (defined herein), MTC covenants to program FTA Formula Funds to pay the MTC Funding Obligation (defined herein), including all related costs and reimbursements, and to pay and assign to BAIFA the Programmed Grant Receipts (each as defined herein);

**NOW THEREFORE**, in consideration of the foregoing and the Parties' promises set forth in this Agreement, the Parties agree as follows:

**Section 1. Definitions; Construction.**

(a) Definitions. In addition to the terms defined in the above recitals and elsewhere in this Agreement, the following terms are defined below.

**Agreement** means this Regional Transit Project Funding Agreement, dated as of the Effective Date, by and between MTC and BAIFA, as may be amended from time to time.

**Authorized Representative** means (i) with respect to MTC, the Executive Director of MTC or such representative or representatives of MTC designated to act on behalf of MTC by the Commissioners or the Executive Director of MTC; and (ii) with respect to BAIFA, the Executive Director of BAIFA, any Deputy Executive Director of BAIFA, the Treasurer of BAIFA, or any other employee, employees, representative or representatives of BAIFA designated to act on behalf of BAIFA by the board of BAIFA.

**BAIFA** means the Bay Area Infrastructure Financing Authority.

**BAIFA Authorizing Resolution** means the resolution(s) of BAIFA authorizing the issuance or incurrence, from time to time, of BAIFA Obligations, subject to the terms of this Agreement and the related BAIFA Financing Documents, in substantially the form presented to the governing board of BAIFA and subject to the revisions approved by an Authorized Representative of BAIFA.

**BAIFA Disbursements** means amounts paid by BAIFA to MTC for further disbursement to BART, or to BART at the request and on behalf of MTC, all as subject to the terms of this Agreement, the MTC LONP and the other BAIFA Financing Documents, for costs of the BART Project paid or to be paid by BART.

**BAIFA Financing Documents** means this Agreement, the BAIFA Authorizing Resolution, the BART T&R Project Funding Agreement, the BART Project Loan Agreement, the MTC Written Designation, and any and all other certificates, letters agreements, and documents executed and delivered by BAIFA from time to time establishing the terms and conditions for the issuance, sale, execution, delivery, security, payment and administration of the BAIFA Obligations.

**BAIFA Obligations** means bonds, notes, certificates or other obligations, including, without limitation, variable rate debt obligations, commercial paper, revolving credit agreements, lines of credit (and extensions thereof), loans, leases, lease purchases, and other purchase agreements, that are entered into, issued or incurred from time to time by BAIFA, and payable by BAIFA from Programmed Grant Receipts received from MTC, for the purpose of providing proceeds to fund or refund BAIFA Disbursements or other BAIFA Obligations or to pay MTC for an MTC Debt Service Advance or MTC Project Disbursement, in each case pursuant to the terms of this Agreement, the MTC LONP and the other BAIFA Financing Documents, and all other financing costs, including but not limited to interest costs, costs of issuance, fees, service charges, commitment fees, and other costs relating thereto as specified in the BART Project Loan Agreement.

**BART** means the San Francisco Bay Area Rapid Transit District.

**BART Project** means the acquisition by BART of 669 replacement railcars, as further described in Exhibit A to the BART T&R Project Funding Agreement.

**BART Project Loan Agreement** means the Credit Agreement, dated as of [\_\_\_\_\_] 1, 2023 by and between BAIFA and the Lender, as it may be amended, modified and/or restated from time to time.

**BART T&R Project Funding Agreement** means the Project Funding Tax and Regulatory Agreement, dated as of [\_\_\_\_\_] 1, 2023 by and between MTC and BART, and acknowledged by BAIFA, as it may be amended, modified and/or restated from time to time.

**Bay Area Region** means the nine-counties of the San Francisco Bay Area for which MTC acts as the regional transportation planning agency.

**Code** means the Internal Revenue Code of 1986, as amended, including any implementing regulations and any administrative or judicial interpretations.

**Effective Date** means [\_\_\_\_\_] 1, 2023, which is the date this Agreement takes effect.

**Event of Default** has the meaning ascribed to such term in Section 6(a) of this Agreement.

**Federal Fiscal Year** means the period of twelve months ending September 30 of each year, or any other annual period hereafter designated by the FTA as its fiscal year.

**FTA** means the United States Federal Transit Administration.

**FTA Formula Funds** means funds apportioned to Participating UZAs by FTA pursuant to the formulas set forth in Section 5336, Section 5337 or Section 5339, as applicable, of Chapter 53 of Title 49 of the United States Code, including, (i) Section 5307 Urbanized Area Formula Funding Program funds, (ii) Section 5337 State of Good Repair Program funds; and (iii) any other lawfully available grant or other funding program administered by FTA which provides funds to MTC and which MTC has irrevocably designated as FTA Formula Funds in an MTC Written Declaration.

**FTA Master Agreement** means the United States of America Department of Transportation Federal Transit Administration Master Agreement, as it may be amended, supplemented, restated or superseded from time to time, that sets forth the standard terms and conditions that apply to projects financed with federal funds awards, the terms and conditions of which are incorporated herein by reference.

**Funding Shortfall Event** has the meaning ascribed to such term in Section 5(b) of this Agreement.

**Lender** means Bank of America, N.A.

**MTC** means the Metropolitan Transportation Commission, acting in its capacity as the “designated recipient” as defined in Section 5302 of Chapter 53 of Title 49 of the United States Code for the Participating UZAs or its capacity as the designated “metropolitan planning organization” as defined in Section 5303 of Chapter 53 of Title 49 of the United States Code for the Bay Area Region, as applicable.

**MTC Debt Service Advance** means amounts transferred by MTC, in its sole discretion, to BAIFA or the Lender from funds that are lawfully available to MTC other than FTA Formula Funds, proceeds of BAIFA Obligations or MTC Project Disbursements, to provide funds to pay BAIFA Obligations, including interest and other financing costs for which sufficient Programmed Grant Receipts have not been otherwise transferred to BAIFA, and for which MTC shall be eligible under the terms of the MTC LONP to subsequently Program, and be reimbursed from, FTA Formula Funds and designated in writing by MTC as constituting an MTC Debt Service Advance.

**MTC Funding Obligation** means an amount equal to (i) the amount of the outstanding BAIFA Obligations, including interest and other financing costs, coming due and payable at any time during each Federal Fiscal Year, plus (ii) the amount of all other obligations coming due and payable under the BART Project Loan Agreement at any time in each such Federal Fiscal Year and, in each case, not paid from other lawfully available sources in such Federal Fiscal Year.

**MTC LONP** means the Amended Letter of No Prejudice with respect to the BART Project received by MTC from FTA, dated June 9, 2023, establishing eligibility of MTC Funding Obligations or BAIFA Obligations to be repaid with FTA Formula Funds and irrevocably designated as an MTC LONP for purposes of the MTC Written Designation pursuant to this Agreement, together with any amendments or supplements thereto.

**MTC Project Disbursements** means amounts paid by MTC to BART, from funds that are lawfully available to MTC other than FTA Formula Funds or proceeds of BAIFA Obligations, for payment of costs of the BART Project, and designated in writing by MTC as constituting an MTC

Project Disbursement, provided that MTC shall be eligible under the terms of the MTC LONP to be subsequently reimbursed for such advances from Programmed Grant Receipts.

**MTC Written Designation** means a certificate of MTC in substantially the form attached hereto as Exhibit A delivered to BAIFA irrevocably designating the Programmed Grant Receipts and the MTC LONP for the benefit of BAIFA.

**Participating UZAs** means the UZAs of Antioch, Concord-Walnut Creek, Livermore-Pleasanton-Dublin and San Francisco-Oakland urbanized areas, and any successors thereto as contemplated in the MTC LONP.

**Parties** means MTC and BAIFA.

**Program or Programming** means, consistent with MTC Resolution No. 4444, the San Francisco Bay Area Transit Capital Priorities Process and Criteria, for each Federal Fiscal Year during the term of this Agreement, MTC taking all actions necessary to: (i) prepare MTC's TCP program recommendations for approval by MTC, (ii) prepare MTC's TIP recommendation for approval by MTC; (iii) prepare and submit grant applications to FTA necessary to receive FTA Formula Funds from FTA for such Federal Fiscal Year in an amount sufficient to pay all BAIFA Obligations anticipated to become due and payable in such Federal Fiscal Year; and (iv) reprogram, to the extent permitted by law, available FTA Formula Funds appropriated in prior Federal Fiscal Years to the extent that as of the last Business Day of the current Federal Fiscal Year, the FTA Formula Funds required to make payment of BAIFA Obligations then due and payable from the current Federal Fiscal Year appropriations have not been received.

**Programmed Grant Receipts** means the portion of FTA Formula Funds that are received and Programmed by MTC to pay MTC Funding Obligations as provided in this agreement and in accordance with the MTC LONP.

**RTP** means the Regional Transportation Plan described in Sections 65080 and 66508 of the California Government Code.

**TCP** means MTC's Transit Capital Priorities process.

**TIP** means the Transportation Improvement Program developed by MTC, as the Bay Area MPO, in accordance with Section 450.300 of Title 23 of the Code of Federal Regulations.

**UZA** means "urbanized area" as defined in Section 5302 and Section 5303, as applicable, of Chapter 53 of Title 49 of the United States Code.

(b) **Construction.** Unless the context of this Agreement otherwise clearly requires, references to the plural include the singular, to the singular include the plural and to the part include the whole. The word "including" shall be deemed to mean "including but not limited to," and the word "or" has the inclusive meaning represented by the phrase "and/or." The words "hereof," "herein," "hereunder" and similar terms in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement. The Section headings contained in this Agreement and the table of contents preceding this Agreement are for reference purposes only and shall not control or affect the construction of this Agreement or the interpretation thereof in

any respect. Section, subsection and exhibit references are to this Agreement unless otherwise specified. Unless otherwise specified, defined terms referencing any entity shall include its successors and assigns, as applicable, and defined terms referencing any federal program, statute, regulation, code section or other law shall include all successors or replacements therefor.

(c) Accounting Terms. Unless otherwise specified herein, all accounting terms used herein shall be interpreted, all accounting determinations hereunder shall be made, and all financial statements required to be delivered hereunder shall be prepared, in accordance with Generally Accepted Accounting Principles applicable to government entities in the United States.

## **Section 2. Purposes; BAIFA Obligations; MTC Written Designation.**

(a) Purpose. This Agreement sets forth the commitments of MTC and BAIFA to facilitate MTC's regional transportation planning process by way of BAIFA facilitating the financing and refinancing of a portion of the costs of the BART Project, including from the proceeds of BAIFA Obligations.

(b) BAIFA Obligations. Subject to the terms and conditions of this Agreement, BAIFA, with assistance from MTC, shall undertake financings and refinancings to facilitate the cost-effective issuance or incurrence by BAIFA of BAIFA Obligations from time to time, including any BAIFA Obligations issued to and purchased by MTC, for BAIFA to provide BAIFA Disbursements for the benefit of the BART Project and to reimburse MTC for any MTC Project Disbursement and any MTC Debt Service Advance.

(c) MTC Obligations; MTC Written Designation. To secure the MTC Funding Obligation established by this Agreement and to induce BAIFA to incur BAIFA Obligations under the BART Project Loan Agreement, MTC shall deliver its MTC Written Designation to BAIFA on the Effective Date.

## **Section 3. Obligations of MTC; Programmed Grant Receipts.**

(a) Programming of FTA Formula Funds; Requests for Payment of FTA Formula Funds. Subject to the terms of this Agreement and the MTC LONP, MTC shall take all actions within its control (including, without limitation, the timely exercise of rights and remedies provided to MTC under the BART T&R Project Funding Agreement) to Program for each Federal Fiscal Year an aggregate amount of FTA Formula Funds sufficient to pay for such Federal Fiscal Year:

- (i) the MTC Funding Obligation;
- (ii) the amount necessary to pay MTC for an MTC Debt Service Advance not previously reimbursed; and
- (iii) the amount necessary to pay MTC for an MTC Project Disbursement made in a prior Federal Fiscal Year and not previously reimbursed.

MTC shall draw down the FTA Formula Funds Programmed by MTC to pay MTC Funding Obligations through FTA's electronic clearinghouse operation web system at least three (3)



business days prior to any designated payment date for the BAIFA Obligations and, upon receipt, shall promptly transfer the amount of such FTA Formula Funds to the designated BAIFA account not less than one (1) business day prior to any designated payment date for the BAIFA Obligations.

(b) Priorities of FTA Formula Funds. MTC hereby covenants and agrees that prior to and during each Federal Fiscal Year during the term of this Agreement, it will Program the applicable amount of FTA Formula Funds for the purposes set forth in Section 3(a) of this Agreement, it being understood that FTA Formula Funds Programmed in respect of the MTC Funding Obligation shall have priority over FTA Formula Funds that are Programmed by MTC in respect of the amounts described in Section 3(a)(iii) of this Agreement. MTC's Programming of FTA Formula Funds for the purposes described in Section 3(a)(i) of this Agreement shall have precedence over all other programming of FTA Formula Funds by MTC to other projects or purposes in each applicable Bay Area UZA. After payment or funding of all amounts necessary to make the payments specified in Section 3(a) of this Agreement, any remaining FTA Formula Funds may be Programmed by MTC for any other lawful purpose. As long as any MTC Funding Obligation remains unpaid, MTC agrees not to amend or modify its project funding score priorities set forth in Resolution 4444 of the MTC board of directors dated January 27, 2021, as revised on September 28, 2022, if as a result thereof the repayment of the MTC Funding Obligations is in any project funding score priority other than the highest project funding score priority.

(c) Pledge; Application of Programmed Grant Receipts. MTC hereby pledges to BAIFA a security interest in and lien on all of its right, title and interest, whether now owned or in the future acquired by it and whether now existing or in the future coming into existence and wherever located, in and to the Programmed Grant Receipts to secure and pay, pursuant to Section 3(a) of this Agreement, all MTC Funding Obligations. Said pledge shall be valid and binding without any physical delivery or further act and shall be irrevocable until all MTC Funding Obligations, BAIFA Obligations, and other obligations and amounts due under this Agreement and the BAIFA Financing Documents are no longer outstanding pursuant to the terms thereof.

(d) Limitation of MTC Obligation. MTC's obligation to pay all amounts as set forth in this Agreement, including without limitation MTC Funding Obligations, is a special, limited obligation payable solely from Programmed Grant Receipts, and MTC is not liable, and shall not be deemed to be liable, in any way for payment of such amounts from any source of funds, excepting solely Programmed Grant Receipts actually received (or receivable) at any time by MTC. No other moneys or funds of MTC are hereby pledged or available for such purposes. MTC is not liable, and shall not be deemed to be liable, in any way for payment of BAIFA Obligations. If the federal government declines or ceases to appropriate or award the Programmed Grant Receipts to MTC or to authorize MTC to Program Programmed Grant Receipts to payment of MTC Funding Obligations, MTC has no obligation, and shall not be deemed to have any obligation, to provide any funding for payment of such amounts to BAIFA, or for payment of the BAIFA Obligations generally, under this Agreement or the BART Project Loan Agreement.

(e) MTC Debt Service Advances. MTC may determine, in its sole discretion, that to carry out the purposes and intents of this Agreement and to meet the goals of the RTP and TIP, it is necessary and appropriate to make MTC Debt Service Advances. At no time shall MTC be obligated to make such MTC Debt Service Advances, and any MTC Debt Service Advances

shall be made only to the extent MTC shall be eligible under the terms of the MTC LONP to exercise its Programming authority to be reimbursed from eligible FTA Formula Funds for such amounts in future funding cycles as set forth in Section 3(a)(iii) of this Agreement.

(f) Tax Covenant. MTC covenants and agrees that it will at all times do and perform all acts and things permitted by law and this Agreement that are necessary to assure that interest paid on any BAIFA Obligations that are designated as tax-exempt obligations will be excluded from gross income for federal income tax purposes and will take no action that would result in such interest not being so excluded. This covenant shall survive payment in full or defeasance of the BAIFA Obligations.

(g) Assistance with Issuance of BAIFA Obligations. MTC covenants and agrees that it will at all times do and perform all acts and things permitted by law and this Agreement that are necessary to assist BAIFA with BAIFA's issuance or incurrence of BAIFA Obligations, including assisting with compliance with federal securities law and the Code. Without limiting the foregoing, as long as any BAIFA Obligations remain outstanding and the funding commitment of Lender under the BART Project Loan Funding has not terminated, MTC covenants and agrees (i) to comply with its obligations under the BART T&R Project Funding Agreement and to timely exercise its rights and remedies thereunder to the fullest extent permitted by law; (ii) to promptly provide to BAIFA or Lender, as the case may be, such, material information regarding the BART Project as BAIFA and/or Lender may reasonably request or which BART provides to MTC (including, without limitation, any audit report that MTC obtains as a result of MTC's audit of the books and records of BART relating to the BART Project), it being understood that routine day-to-day communications between BART and MTC regarding requisitions and invoices shall not be considered "material;" (iii) to provide BAIFA and Lender with prompt written notice of the occurrence of an "Event of Default" under the BART T&R Project Funding Agreement; (iv) to provide written notice of any proceeding or investigation of which an Authorized Representative of MTC has actual knowledge against BART, MTC or any other person or entity, in any court or before any governmental authority or arbitration board or tribunal, that, if determined adversely, would reasonably be expected to materially adversely affect the eligibility of the BART Project to receive FTA Formula Funds; (v) to assist BAIFA in satisfying its reporting obligations and information requirements under the BART T&R Project Funding Agreement and to deliver BART requisition requests to BAIFA and Lender; (vi) not to revoke or seek to revoke the MTC Written Designation; (vii) not amend, modify or terminate or seek to amend, modify or terminate the MTC LONP without Lender's prior written consent; (viii) not to amend, modify, waive, terminate or forebear enforcement of any provision of the BART T&R Project Funding Agreement without Lender's prior written consent; and (ix) without Lender's prior written consent in each instance, not to consent to any request of BART to (1) cease to operate or modify the operations of the BART Project or take any action such that the BART Project would cease to qualify for FTA Formula Funds and/or (2) take any action that would result in the BART Project no longer qualifying for FTA Formula Funds, including without limitation any action that would constitute a breach of the terms of the FTA Master Agreement resulting in such loss of qualification.

**Section 4. BAIFA Obligations.** BAIFA shall issue or incur the BAIFA Obligations, in one or more series, from time to time, subject to the provisions of the BAIFA Authorizing Resolution, this Agreement and the BART Project Loan Agreement, to provide moneys to (i) fund BAIFA Disbursements, pursuant to requisitions from BART received by MTC and delivered to BAIFA and Lender in accordance with the terms of the BART Project Loan Agreement, (ii) refund or pay capitalized interest on BAIFA Disbursements or other BAIFA Obligations, (iii) to pay fees and other amounts owing to the Lender under the BART Project Loan Agreement, and (iv) pay MTC for any MTC Debt Service Advance or MTC Project Disbursement not previously reimbursed but solely to the extent that such MTC Debt Service Advance or MTC Project Disbursement qualifies for reimbursement from FTA Formula Funds Programmed by MTC and such repayment is requested by MTC.

**Section 5. Federal Funding.**

(a) Generally. During the term of this Agreement, MTC shall comply with all applicable laws of the United States of America and regulations of the FTA relating to the FTA Formula Funds (including 49 U.S.C. Section 5307 and 49 U.S.C. Section 5337) to be eligible to receive the FTA Formula Funds described in Section 3(a) of this Agreement, and to facilitate the timely receipt of the Programmed Grant Receipts.

(b) Insufficient Federal Funding; Funding Shortfall Event. In any Federal Fiscal Year in which either the (a) federal authorization of FTA Formula Funds, (b) annual appropriation of FTA Formula Funds, or (c) annual apportionment of FTA Formula Funds to the Participating UZAs is insufficient to provide the full amount of Programmed Grant Receipts necessary for the payment of the MTC Funding Obligation for such Federal Fiscal Year (each, a "Funding Shortfall Event"), MTC shall Program the maximum amount of Programmed Grant Receipts possible subject to the federal authorization, appropriation, and obligational authority amounts provided to the Participating UZAs in such Federal Fiscal Year and the Programming priority set forth in Section 3(b) of this Agreement in such Federal Fiscal Year, and in each subsequent Federal Fiscal Year until all of the MTC Funding Obligations have been paid. **FOR THE AVOIDANCE OF DOUBT AND NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT A FUNDING SHORTFALL EVENT SHALL IN NO CIRCUMSTANCE CONSTITUTE AN EVENT OF DEFAULT UNDER THIS AGREEMENT.**

(c) Prepayment. MTC shall have the right at any time or from time to time to prepay all or any part of the MTC Funding Obligations from lawfully available funds, subject to delivery of an opinion of counsel from a firm of nationally-recognized attorneys-at-law experienced in legal work relating to the issuance of municipal bonds selected by BAIFA that such prepayment will not, in and of itself, adversely affect the exclusion of interest on such BAIFA Obligations from gross income for federal income tax purposes or BAIFA's receipt of any tax credit or other subsidy in connection with such BAIFA Obligations, if applicable. BAIFA agrees that the BART Project Loan Agreement shall provide that Lender is obligated to accept such prepayments when the same are tendered by BAIFA in the manner and subject to the terms and conditions set forth in the BART Project Loan Agreement.

**Section 6. Events of Default and Remedies.**

(a) Events of Default. Each of the following constitutes an “Event of Default” hereunder:

(i) A failure by MTC to transfer to BAIFA available Programmed Grant Receipts in the amounts set forth in Section 3(a)(i) of this Agreement, provided that to the extent Programmed Grant Receipts received by MTC from FTA are not available in sufficient amounts due to a Funding Shortfall Event, such failure shall not be an Event of Default.

(ii) A failure by MTC to take action under Section 5(b) to Program the maximum amount of Programmed Grant Receipts, for a period of thirty (30) days after (A) the earlier of written notice, specifying such failure and requesting that it be remedied, has been given to MTC by BAIFA or by the Lender on behalf of BAIFA and (B) an Authorized Representative of MTC has actual knowledge of such failure; provided that, if such failure can be remedied but not within such thirty (30) day period and if MTC has taken all action reasonably possible to remedy such failure within such thirty (30) day period, such failure shall not become an Event of Default for so long as MTC shall diligently proceed to remedy the same;

(iii) A failure by MTC to observe or perform any covenant, condition, agreement or provision in this Agreement on its part to be observed or performed, other than as referred to in subsection (a)(i) of this Section 6, and such failure shall continue unremedied for a period of sixty (60) days after (A) the earlier of written notice, specifying such failure and requesting that it be remedied, has been given to MTC by BAIFA or by the Lender on behalf of BAIFA and (B) an Authorized Representative of MTC has actual knowledge of such failure; provided that, such failure shall not become an Event of Default if such failure can be remedied but not within such sixty (60) day period as long as MTC has taken all action reasonably possible to remedy such failure within such sixty (60) day period and MTC shall diligently continue to proceed to remedy the same;

(iv) A failure by BAIFA to observe or perform any covenant, condition, agreement or provision in this Agreement on its part to be observed or performed, other than as referred to in subsection (a)(i) or (a)(ii) of this Section 6, and such failure shall continue unremedied for a period of sixty (60) days after (A) the earlier of written notice, specifying such failure and requesting that it be remedied, has been given to BAIFA by MTC and (B) an Authorized Representative of BAIFA has actual knowledge of such failure; provided that, such failure shall not become an Event of Default if such failure can be remedied but not within such sixty (60) day period as long as BAIFA has taken all action reasonably possible to remedy such failure within such sixty (60) day period and BAIFA shall diligently continue to proceed to remedy the same;

(v) Any material provision of this Agreement (including without limitation those contained in Section 3(a) and Section 3(c) of this Agreement) at any time for any reason ceases to be valid and binding on MTC as a result of any legislative or administrative action by a governmental authority with competent jurisdiction or is

declared in a final non-appealable judgment by any court with competent jurisdiction to be null and void, invalid or unenforceable, or the validity or enforceability thereof is publicly contested by MTC, or MTC publicly contests the validity or enforceability of any obligation to Program FTA Formula Funds, or any Authorized Representative of MTC publicly repudiates or otherwise denies in writing that it has any further liability or obligation under or with respect to any provision of this Agreement.

(b) Remedies.

(i) Upon the occurrence of an Event of Default as set forth in subsections (a)(i), (a)(ii) or (a)(iii) of this Section 6, BAIFA, or the Lender on behalf of BAIFA, shall have the sole right to compel MTC to perform and carry out its covenants and agreements with BAIFA as provided herein in an action for a writ of mandamus.

(ii) Upon the occurrence of an Event of Default as set forth in subsections (a)(iv) of this Section 6, MTC shall have the right to compel BAIFA to perform and carry out its covenants and agreements with MTC as provided herein in an action for a writ of mandamus.

(iii) Upon the occurrence of any Event of Default (other than an Event of Default set forth in subsection (a)(iv) of this Section 6), BAIFA, or the Lender on behalf of BAIFA, may exercise any and all remedies as it may have under the BAIFA Financing Documents and as otherwise available at law and at equity.

(iv) Upon the occurrence of any Event of Default set forth in subsection (a)(iv) of this Section 6, MTC may exercise any and all remedies as it may have under the BAIFA Financing Documents and as otherwise available at law and at equity.

(c) Cumulative Remedies. The rights and remedies under this Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise.

**Section 7. General Provisions.**

(a) Term. This Agreement shall be effective on the Effective Date and shall terminate when no further MTC Funding Obligations remain due pursuant to this Agreement.

(b) BART T&R Project Funding Agreement. The BART T&R Project Funding Agreement shall be acknowledged by BAIFA and the terms and conditions of the BART T&R Project Funding Agreement shall be incorporated by reference into this Agreement to the fullest extent necessary to facilitate the issuance of the BAIFA Obligations and included as Exhibit C hereto; provided, however, if there is a conflict between specific provisions of this Agreement and the provisions of the BART T&R Project Funding Agreement incorporated herein, the specific provisions of this Agreement (excluding the BART T&R Project Funding Agreement incorporated herein) shall govern for purposes of interpreting this Agreement.

(c) Further Actions. Each Party shall diligently fulfill the duties assigned to it under this Agreement, including executing and delivering all such documents and instruments as

shall be required to enable the Parties to perform their respective obligations hereunder, and to give effect to the transactions contemplated by this Agreement.

(d) Severability. The Parties agree that if any term or provision of this Agreement is declared by a court of competent jurisdiction to be invalid, unenforceable, illegal, or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the Parties shall be construed and enforced as if this Agreement did not contain the particular term or provision held to be invalid unless the exclusion of the particular term or provision held to be invalid would defeat the purposes of this Agreement in which case the Parties shall negotiate in good faith to modify this Agreement to give effect to the original intent of the Parties as closely as possible in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

(e) Assignment. The Parties agree that neither Party may assign any of the responsibilities under this Agreement without the written consent of the other Party.

(f) No Construction Against Drafter. This Agreement is to be construed as if the Parties drafted it jointly.

(g) Third Party Beneficiaries; Pledge of Agreement. MTC and BAIFA are the only Parties entitled to enforce the terms of this Agreement, and nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right to any third-party. Notwithstanding the foregoing, the Lender shall be a third-party beneficiary to the representations, covenants and agreements set forth in this Agreement; provided that, the Lender shall have the sole right to enforce the terms of this Agreement on behalf of BAIFA as provided in Section 6(b)(i) and 6(b)(iii) of this Agreement.

MTC hereby consents and agrees that BAIFA may, and shall, assign, pledge and grant to the Lender a security interest in and lien on and over BAIFA rights and remedies set forth in this Agreement.

(h) No Set-Off. If a dispute arises between the Parties, MTC and BAIFA agree that so long as the BAIFA Obligations are outstanding and the funding commitment of Lender under the BART Project Loan Funding has not terminated neither Party shall take any action that would reduce the amounts of Programmed Grant Receipts that are to be applied and paid under this Agreement as a set-off for damages MTC or BAIFA may claim it is owed. To the extent MTC or BAIFA is entitled to any damages for any breach by BART of the terms of the BART T&R Project Funding Agreement, MTC or BAIFA shall seek payment of those damages solely from funds of BART and not from Programmed Grant Receipts.

(i) Notices. All notices to be given under this Agreement must be in writing and addressed as shown below, or to other addresses that either Party may hereafter indicate pursuant to this Section. Notices may be delivered by personal delivery or mailed, postage prepaid. Any such notice is effective five calendar days after mailing, or upon actual delivery if personally delivered.

**Metropolitan Transportation Commission**  
Bay Area Metro Center

375 Beale Street, Suite 800  
San Francisco, California 94105  
Attention: Chief Financial Officer  
Phone: (415) 778-6700  
Fax: (415) 536-9815

**Bay Area Infrastructure Financing Authority**

Bay Area Metro Center  
375 Beale Street, Suite 800  
San Francisco, California 94105  
Attention: Treasurer  
Phone: (415) 778-6700  
Fax: (415) 536-9815

**With copy to Lender:**

Municipal Banking and Markets  
Bank of America, N.A  
100 Federal Street  
Boston, MA 02110  
Attention: Collin De La Bruere  
Telephone: (617) 434-1362  
Email: collin.delabruere@bofa.com

(j) Entire Agreement. This Agreement (including all exhibits, schedules or attachments) constitutes the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements or representations, oral or written, not specified herein regarding this Agreement (including all exhibits, schedules or attachments). No waiver, consent, modification, or change of terms of this Agreement shall bind either Party unless in writing and signed by the Authorized Representative of both Parties and all necessary approvals have been obtained. Such waiver, consent, modification, or change, if made, shall be effective only in the specific instance and for the specific purpose given.

(k) Amendments, Waivers. This Agreement may not be amended without the prior written consent of an Authorized Representative of MTC, an Authorized Representative of BAIFA and, while BAIFA Obligations are outstanding, the Lender. This Agreement may not be amended in a manner that is not in compliance with applicable State and federal laws or, to the extent the interest on BAIFA Obligations is intended to be excludable from gross income, the provisions of the Code applicable to obligations bearing interest that is excludable from gross income. No waiver or consent is effective unless in writing and executed by the Authorized Representative of the Party against whom such waiver or consent is sought to be enforced and the Lender. Such waiver or consent will be effective only in the specific instance and for the specific purpose given. In the event that federal rules or federal laws change in a manner that affects the administration of this Agreement, the outstanding BAIFA Obligations, or the payment of debt service on the BAIFA Obligations, the Parties in consultation with the Lender, whose consent shall not be unreasonably withheld, shall negotiate in good faith to amend or modify this Agreement to

give effect to the original intent of the Parties as closely as possible in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

(l) Choice of Law; Designation of Forum; Federal Forum. The laws of the State of California (without giving effect to its conflicts of law principles) govern all matters arising out of or relating to this Agreement, including, without limitation, its validity, interpretation, construction, performance, and enforcement. Any Party bringing a legal action or proceeding against any other Party arising out of or relating to this Agreement shall bring the legal action or proceeding in the Superior Court of California County of San Francisco (unless California law requires that it be brought and conducted in another county). Each Party hereby consents to the exclusive jurisdiction of such court, waives any objection to venue, and waives any claim that such forum is an inconvenient forum. Notwithstanding the above, if a claim must be brought in a federal forum, then it must be brought and adjudicated solely and exclusively within the United States District Court for the Northern District of California.

(m) Integration. This Agreement (including all exhibits, schedules or attachments) constitutes the entire agreement between the Parties on the subject matter. There are no unspecified understandings, agreements or representations, oral or written, regarding this Agreement.

(n) Execution in Counterparts. This Agreement may be signed in several counterparts, each of which is an original and all of which constitute one and the same instrument. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

[SIGNATURE PAGES FOLLOW]



IN WITNESS WHEREOF, the Parties hereby acknowledge that they have the authority granted by their respective governing body to execute this Agreement and hereto have set their hands as of the Effective Date.

**METROPOLITAN TRANSPORTATION  
COMMISSION**

**BAY AREA INFRASTRUCTURE  
FINANCING AUTHORITY**

By \_\_\_\_\_  
Andrew B. Fremier, Executive Director

By \_\_\_\_\_  
Derek Hansel, Treasurer

**EXHIBIT A**  
**FORM OF MTC WRITTEN DESIGNATION**

**FORM OF MTC WRITTEN DESIGNATION**

**TO: Bay Area Infrastructure Financing Authority (“BAIFA”) and Bank of America, N.A., as Lender (the “Lender”) under the BART Project Loan Agreement, dated as of [\_\_\_\_\_] 1, 2023, by and between BAIFA and the Lender.**

The Metropolitan Transportation Commission (“MTC”), a public entity duly organized and existing under the laws of the State of California, hereby states and certifies:

(a) that Andrew B. Fremier is the duly appointed, qualified and acting Executive Director of MTC, and as such, is familiar with the facts herein certified and is authorized and qualified to certify the same;

(b) that MTC irrevocably designates the letter from the Federal Transit Administration, dated June 9, 2023, attached hereto as Exhibit A, as a “MTC LONP” as such term is defined in the Regional Transit Project Funding Agreement, dated as of [\_\_\_\_\_] 1, 2023, by and between MTC and BAIFA (the “RTF Agreement”); and

(c) that MTC irrevocably designates the funds described in the MTC LONP attached hereto as Exhibit A as “Programmed Grant Receipts” as such term is defined in the RTF Agreement.

**METROPOLITAN TRANSPORTATION  
COMMISSION**

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Andrew B. Fremier,  
Executive Director

Date [\_\_\_\_\_] 1, 2023