

REQUEST FOR COUNCIL ACTION

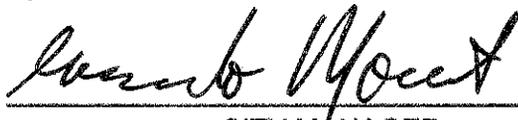


CITY COUNCIL MEETING DATE:
FEBRUARY 7, 2017

CLERK OF COUNCIL USE ONLY:

TITLE:

COOPERATIVE AGREEMENT WITH
THE ORANGE COUNTY
TRANSPORTATION AUTHORITY
FOR THE USE OF RIGHT OF WAY
FOR THE OC STREETCAR
PROJECT (NON-GENERAL FUND)
{STRATEGIC PLAN NOS. 3, 2C, 4B; 6, 1G}


CITY MANAGER

APPROVED

- As Recommended
- As Amended
- Ordinance on 1st Reading
- Ordinance on 2nd Reading
- Implementing Resolution
- Set Public Hearing For _____

CONTINUED TO _____

FILE NUMBER _____

RECOMMENDED ACTION

Authorize the City Manager and Clerk of the Council to execute a cooperative agreement with the Orange County Transportation Authority for the term beginning on the effective date of this agreement for a period of 50 years, subject to nonsubstantive changes approved by the City Manager and City Attorney.

DISCUSSION

On July 7, 2015, a Memorandum of Understanding (MOU) was approved by City Council with the Orange County Transportation Authority (OCTA) for implementation of the OC Streetcar Project (Project). The MOU outlines the general roles and responsibilities for the development, implementation, operations, and maintenance phases of the Project between the City of Santa Ana and OCTA. The MOU was subsequently approved by the OCTA Board of Directors on July 13, 2015. On March 15, 2016, a Design Cooperative Agreement with OCTA was approved by City Council for design of the OC Streetcar Project.

The Federal Transit Administration requires grantees to have "continuing control" on property where federal funds have been invested through the implementation of a transit project. The recommended agreement provides the requisite continuing control for OCTA to construct, operate, and maintain the Project in the City's public right of way. The intent of the agreement is to define the limits of use and each agency's roles, responsibilities, and commitments as they relate to OCTA's facilities in the public right of way. The public right of way includes the City's streets and other improvements owned or controlled by the City.

Consensus has been reached with OCTA on the specific terms and conditions of the draft cooperative agreement (Exhibit 1). A summary of the key provisions of the draft agreement are as follows:

- The term of this agreement is for 50 years with a 20-year extension at the discretion of OCTA. Further extensions are allowed upon mutual agreement.
- The limits of the use of the City's public right of way secured by this agreement are consistent with the OC Streetcar alignment.
- This agreement does not include provisions for parcels of property owned by the City outside of the City's public right of way.
- The City and all third parties must secure a permit from the OCTA when working within the OCTA's controlled work access limits - generally 10' from the overhead contact system (poles, span wires, and contact wire) and within 4' of any rail.
- The City and OCTA agree to keep each other informed about future projects that may impact the others' use of the right of way.
- There is no cost associated with the cooperative agreement.

Staff will request City Council approval for additional agreements throughout 2017, needed to advance the project, including a Construction Cooperative Agreement and an amendment to the Santa Ana Regional Transportation Center Station agreement.

STRATEGIC PLAN ALIGNMENT

Approval of this item supports the City's efforts to meet the following Strategic Plan Goals:

Goal #3 - Economic Development, Objective #2 (create new opportunities for business/job growth and encourage private development through new General Plan and Zoning Ordinance policies), Strategy C (support business development and job growth along transit corridors through the completion of critical transit plans/projects including: The Fixed Guideway Project, Santa Ana Regional Transportation Center Master Plan, Complete Streets and General Plan Circulation Element update).

Goal #3 - Economic Development, Objective #4 (continue to pursue objectives that shape downtown Santa Ana into a thriving, culturally diverse, shopping, dining, and entertainment destination), Strategy B (create a comprehensive program to manage parking that includes innovative strategies to provide parking, create revenue and enhance accessibility in the downtown).

Goal #6 - Community Facilities & Infrastructure, Objective #1 (establish and maintain a Community Investment Plan for all City assets), Strategy G (develop and implement the City's Capital Improvement Program in coordination with the Community Investment and Deferred Maintenance Plans; e.g., transit vision, street car, fixed guideway project, SARTC master plan, Bristol Street widening, neighborhood streets, traffic improvements, park facilities, sport fields, soccer fields, senior centers, bike master plan, etc.).

ENVIRONMENTAL IMPACT

There is no environmental impact associated with this action.

FISCAL IMPACT

There is no fiscal impact associated with this action.



Fred Mousavipour
Executive Director
Public Works Agency

FM/EWG/JG/ST

Exhibits: 1. Use of Right of Way Cooperative Agreement

COOPERATIVE AGREEMENT NO. C-6-1433

BETWEEN

ORANGE COUNTY TRANSPORTATION AUTHORITY

AND

CITY OF SANTA ANA

FOR

USE OF THE CITY RIGHT OF WAY

THIS COOPERATIVE AGREEMENT ("Agreement"), is effective this _____ day of _____, 2017, by and between the Orange County Transportation Authority, 550 South Main Street, P.O. Box 14184, Orange California 92863-1584, a public entity of the State of California (herein referred to as "AUTHORITY") and the City of Santa Ana, a charter city and municipal corporation duly organized and existing under the laws of the State of California (hereinafter referred to as "CITY") each individually known as "Party" and collectively known as the "Parties".

RECITALS:

WHEREAS, the AUTHORITY and the CITY entered into a Memorandum of Understanding ("MOU") on August 31, 2015 for the OC Streetcar Project, which MOU provides, among other things, for the Parties to work in partnership for the implementation of the OC Streetcar Project and the grant from the CITY to the AUTHORITY of a perpetual right to operate the OC Streetcar System within City Right of Way ("ROW");

WHEREAS, the AUTHORITY and the CITY agree that the use of City ROW for the OC Streetcar Project constitutes a use of such right of way for street purposes;

WHEREAS, the AUTHORITY and the CITY entered into a Design Agreement for the design phase of the OC Streetcar Project;

WHEREAS, the AUTHORITY and the CITY intend to enter into a Construction Agreement for

1 the construction phase for the OC Streetcar Project;

2 WHEREAS, the AUTHORITY and the CITY intend to enter into an Operations and
3 Maintenance Agreement for the operations and maintenance phase of the OC Streetcar System;

4 WHEREAS, the CITY is the owner of various City ROW where the OC Streetcar System is
5 proposed;

6 WHEREAS, the AUTHORITY, proposes to occupy and use a portion of such City ROW for
7 the construction of the OC Streetcar Project and the operation, and maintenance of the OC
8 Streetcar System;

9 WHEREAS, this Agreement defines the roles, responsibilities, commitments, obligations, and
10 expectations for the AUTHORITY and the CITY as they relate to the Authority's Use Rights,
11 including financial obligations; and

12 WHEREAS, the CITY desires by this Agreement to grant such rights and privileges to the
13 AUTHORITY, and to document the terms and conditions upon which such City ROW may be used
14 by the AUTHORITY for the construction, operation, and maintenance of the OC Streetcar System.

15 NOW, THEREFORE, it is mutually understood and agreed by the AUTHORITY and the CITY
16 as follows:

17 **ARTICLE 1. DEFINITIONS**

18 The following definitions shall apply throughout this Agreement, which includes those
19 attachments hereto that are incorporated by reference.

20 A. "Authority Use Rights" means the rights to use the City ROW, as granted to the
21 AUTHORITY in this Agreement.

22 B. "City ROW" means the CITY's right of way, including streets and other improvements
23 thereto, which is owned or controlled by the CITY and to which CITY is granting Authority Use
24 Rights as generally depicted in Exhibit A.

25 C. "Construction Agreement" means the cooperative agreement that will be put in place

26 Page 2 of 13

1 between the AUTHORITY and the CITY which will document the terms and conditions pursuant to
2 which the OC Streetcar Project will be constructed.

3 D. "Contractor" means any contractor or consultant who executes an agreement with the
4 AUTHORITY for design and/or construction activities related to the OC Streetcar Project.

5 E. "Design Agreement" means Cooperative Agreement C-5-3583 between Authority and
6 CITY for the design phase of the OC Streetcar Project, dated May 9, 2016, which sets forth the
7 terms and conditions to which the OC Streetcar Project will be designed.

8 F. "Effective Date" means the date this Agreement is executed by both Parties.

9 G. "Occupied City ROW" means that portion of City ROW to be physically occupied by
10 OC Streetcar System Improvements in accordance with this Agreement, the Design Agreement, the
11 Construction Agreement, and Project Submittals.

12 H. "OC Streetcar Project" or "Project" means the planning, design, financing,
13 construction, and installation of the OC Streetcar System as set forth in the Design Agreement
14 and/or Construction Agreement. The OC Streetcar Project becomes the OC Streetcar System upon
15 initiation of Revenue Service.

16 I. "OC Streetcar System" means the OC Streetcar passenger transportation system to
17 be owned, operated, and maintained by the AUTHORITY including all tracks, stations, streetcar
18 vehicles, conduits, electrical lines, traction power poles, traction power substations, cross-span
19 wires, streetcar signal equipment, maintenance facilities, and other functionally related and
20 appurtenant equipment and facilities.

21 J. "Operations and Maintenance Agreement" means the cooperative agreement to be
22 entered into between the AUTHORITY and the CITY establishing the roles, responsibilities, and
23 expectations with respect to the operations and maintenance of the OC Streetcar System.

24 K. "Plans and Specifications" means the Project plans, specifications, and special
25 provisions prepared by the AUTHORITY providing the information necessary to construct the Project

1 which relate to the interests of the CITY under the Design Agreement.

2 L. "Project Submittals" means all shop drawings, product data, test data, construction
3 submittals, construction schedules, fabrication drawings, erection drawings or similar documents
4 which are produced by the AUTHORITY's Contractor during the construction of the Project, which
5 relate to the interests of the CITY under the Construction Agreement, and which are reviewed by the
6 CITY according to procedures and standards set forth in the Construction Agreement.

7 M. "Revenue Service" means the point at which the OC Streetcar System is operational
8 and providing service to the public as intended.

9 **ARTICLE 2. COMPLETE AGREEMENT**

10 A. This Agreement (which includes the above Recitals and those attachments
11 incorporated herein by reference), the Design Agreement, Construction Agreement, and Operations
12 and Maintenance Agreement executed or intended to be executed by the Parties that are
13 incorporated herein by reference, constitute the entire terms and conditions for the subject matter
14 addressed in this Agreement between the AUTHORITY and the CITY. The invalidity in whole or in
15 part of any term or condition of this Agreement shall not affect the validity of other terms or
16 conditions of this Agreement. To the extent there is any conflict as between this Agreement and
17 other agreements entered into by the Parties that are referenced herein, this Agreement shall control
18 with respect to the subject matter covered herein.

19 B. The AUTHORITY's failure to insist on any instances of the CITY's performance of any
20 terms or conditions of this Agreement shall not be construed as a waiver or relinquishment of the
21 AUTHORITY's right to such performance or to future performance of such terms or conditions, and
22 the CITY's obligation in respect thereto shall continue in full force and effect. Changes to any
23 portion of this Agreement shall not be binding upon the AUTHORITY except when specifically
24 confirmed in writing by an authorized representative of the AUTHORITY by way of a written
25 amendment to this Agreement and issued in accordance with the provisions of this Agreement.

1 C. The CITY's failure to insist on any instances of the AUTHORITY's performance of any
2 terms or conditions of this Agreement shall not be construed as a waiver or relinquishment of the
3 CITY's right to such performance or to future performance of such terms or conditions, and the
4 AUTHORITY's obligation in respect thereto shall continue in full force and effect. Changes to any
5 portion of this Agreement shall not be binding upon the CITY except when specifically confirmed in
6 writing by an authorized representative of the CITY by way of a written amendment to this
7 Agreement and issued in accordance with the provisions of this Agreement.

8 **ARTICLE 3. SCOPE OF AGREEMENT**

9 This Agreement specifies the roles and responsibilities of the Parties as they pertain to the
10 AUTHORITY's use of City ROW. Both the AUTHORITY and the CITY agree that each will
11 cooperate and coordinate with the other in all activities covered by this Agreement and any other
12 supplemental agreements that may be required to facilitate the purposes thereof.

13 **ARTICLE 4. CONSIDERATION**

14 In consideration for the Authority Use Rights granted by the CITY to the AUTHORITY
15 hereunder, the AUTHORITY agrees to construct, operate and maintain the OC Streetcar System as
16 set forth in or as to be set forth in the Design Agreement, Construction Agreement, Plans and
17 Specifications, Project Submittals, and Operations and Maintenance Agreement.

18 **ARTICLE 5. TERM**

19 Beginning on the Effective Date, this Agreement and the Authority Use Rights herein granted
20 shall be operative for a period of 50 years (the "Initial Term"), subject to earlier termination as
21 provided by Article 6. AUTHORITY may, in its discretion, extend this Agreement upon the same
22 terms and conditions existing at the time of such extension for an additional term of up to 20 years
23 ("Extended Term"). To exercise its right to the Extended Term, AUTHORITY shall provide written
24 notice to the CITY no later than 24 months prior to the expiration of the Initial Term. For any period
25 beyond the Extended Term, this Agreement may be extended by mutual consent of the Parties at

1 any time prior to the expiration of the Extended Term, to the extent permitted by law.

2 **ARTICLE 6. TERMINATION**

3 A. This Agreement may not be terminated by either Party for convenience.

4 B. This Agreement, and the Authority Use Rights granted hereby, shall be subject to
5 termination at the option of the CITY and by written notice delivered to the AUTHORITY upon the
6 occurrence of any of the following events:

7 (i) The AUTHORITY shall fail to advance the Streetcar Project to begin Revenue
8 Service no later than December 31, 2025, provided any such discontinuation is not caused
9 by Force Majeure as described in Article 13, or

10 (ii) The AUTHORITY shall intentionally abandon the Occupied City ROW, or
11 expressly disavow the Authority Use Rights, or

12 (iii) The AUTHORITY shall discontinue regular OC Streetcar System operations for a
13 consecutive period of one year consistent with the Operations and Maintenance Agreement
14 and requirements of the Federal Transit Administration, provided any such discontinuance is
15 not caused by Force Majeure as described in Article 13 or for other reasons outside
16 AUTHORITY's reasonable control.

17 C. AUTHORITY may terminate this Agreement if the AUTHORITY determines, upon
18 reasonable notice to and concurrence by the CITY, that the OC Streetcar System is not a viable
19 mode of transportation either due to lack of passengers, lack of revenue, lack of funding, other
20 modes of transportation that are developed making the OC Streetcar System relatively inefficient, or
21 other similar reasons.

22 **ARTICLE 7. DEFAULT**

23 Either Party may be deemed in default under this Agreement by the other Party upon the
24 failure of such Party to observe or perform any material covenant, condition or agreement on its part
25 to be observed or performed hereunder, and the continuance of such default for a period of ninety

1 (90) days from the date the failing Party has received written notice from the other Party. Such
2 notice shall specify the default and request that it be remedied within 90 days or such other longer
3 time as may be set forth in the notice. The Party giving such notice may agree in writing to an
4 extension of such time period. If the failure identified in such notice cannot be corrected within the
5 applicable period, it shall not give rise to a default hereunder if appropriate remedial action is
6 promptly instituted within the applicable period and diligently pursued until such default is corrected.
7 In the event of a default hereunder that is not remedied by the defaulting party in accordance with
8 this provision, the non-defaulting Party shall have a breach of contract claim and remedy against the
9 other in addition to any other remedy provided or permitted by law, provided that no remedy which
10 would have the effect of amending any provisions of this Agreement shall become effective without
11 the formal amendment of this Agreement.

12 **ARTICLE 8. COMPLIANCE**

13 To the extent required, the AUTHORITY and the CITY shall comply with all applicable
14 federal, state, and local laws, statues, ordinances and regulations of any governmental authority
15 having jurisdiction over the Project.

16 **ARTICLE 9. INDEMNIFICATION**

17 A. To the fullest extent permitted by law, the CITY shall defend (at the CITY's sole cost
18 and expense with legal counsel reasonably acceptable to the AUTHORITY), indemnify, protect, and
19 hold harmless the AUTHORITY, its officers, directors, employees, and agents from and against any
20 and all liabilities, actions, suits, claims, demands, losses, costs, judgments, arbitration awards,
21 settlements, damages, demands, orders, penalties, and expenses including legal costs and attorney
22 fees, including but not limited to claims arising from injuries to or death of persons (the CITY's
23 employees included), for damage to property, including property owned by the AUTHORITY, or from
24 any violation of any federal, state, or local law or ordinance, alleged to be caused by the negligent
25 acts, omissions or willful misconduct of the CITY, its officers, directors, employees or agents in

1 connection with or arising out of the performance of this Agreement.

2 B. To the fullest extent permitted by law, the AUTHORITY shall defend (at the
3 AUTHORITY's sole cost and expense with legal counsel reasonably acceptable to the CITY),
4 indemnify, protect, and hold harmless the CITY, its officers, directors, employees, and agents from
5 and against any and all liabilities, actions, suits, claims, demands, losses, costs, judgments,
6 arbitration awards, settlements, damages, demands, orders, penalties, and expenses including legal
7 costs and attorney fees, including but not limited to claims arising from injuries to or death of
8 persons (the AUTHORITY's employees included), for damage to property, including property owned
9 by the CITY, or from any violation of any federal, state, or local law or ordinance, alleged to be
10 caused by the negligent acts, omissions or willful misconduct of the AUTHORITY, its officers,
11 directors, employees or agents in connection with or arising out of the performance of this
12 Agreement.

13 C. The indemnification and defense obligations of this Agreement shall survive its
14 expiration or termination.

15 **ARTICLE 10. LEGAL AUTHORITY**

16 The persons executing this Agreement on behalf of the AUTHORITY and the CITY represent
17 that they are authorized to execute this Agreement on behalf of their respective Parties and that, by
18 so executing this Agreement, the Parties hereto are formally bound to the provisions of this
19 Agreement.

20 **ARTICLE 11. SEVERABILITY**

21 If any term, provision, covenant or condition of this Agreement is held to be invalid, void or
22 otherwise unenforceable, to any extent, by any court of competent jurisdiction, the remainder of this
23 Agreement shall not be affected thereby, and each term, provision, covenant or condition of this
24 Agreement shall be valid and enforceable to the fullest extent permitted by law.

25 **ARTICLE 12. COUNTERPARTS OF AGREEMENT**

1 This Agreement may be executed and delivered in any number of counterparts, each of
2 which, when executed and delivered shall be deemed an original and all of which together shall
3 constitute the same agreement. Facsimile or emailed PDF documents with signatures will be
4 permitted.

5 **ARTICLE 13. FORCE MAJEURE**

6 Either Party shall be excused from performing its obligations under this Agreement due to
7 any event beyond the control of the Party to the extent the event materially and adversely affects a
8 Party's ability to perform its obligations under this Agreement and could not have been avoided by
9 reasonable due diligence. Force Majeure events shall include, but not be limited to: (i) discovery of
10 any resources or a change in law which requires a state or federal approval that was not previously
11 required for the Project; (ii) regulatory and technical changes not previously required for the Project;
12 (iii) fire, flood, earthquake, or other natural disaster; (iv) strikes and labor disputes of greater than 30
13 days; (v) delays caused by permitting agencies that exceed the reasonably anticipated review times;
14 (vi) failure of utilities to relocate in a reasonable time; and (vii) war, terrorist activities, government
15 sanctions, embargos, civil unrest, and material or labor shortages. A Party's performance will only
16 be excused for the length of the delay and any reasonable time thereafter that is necessary to
17 commence performance of a Party's obligations under this Agreement.

18 **ARTICLE 14. ASSIGNMENT**

19 Neither this Agreement, nor any of the Parties' rights, obligations, duties, or authority
20 hereunder may be assigned in whole or in part by either Party without the prior written consent of the
21 other Party. Any such attempt of assignment shall be deemed void and of no force and effect.
22 Consent to one assignment shall not be deemed consent to any subsequent assignment, nor the
23 waiver of any right to consent to such subsequent assignment. Notwithstanding the foregoing,
24 AUTHORITY may assign this Agreement to another public entity provided that it provides notice to
25 CITY at least six (6) months prior to the effective date of such assignment. The notice shall include

1 evidence that such public entity is authorized by law to operate the Streetcar System and has the
2 financial capability, infrastructure and personnel to meet AUTHORITY's obligations under this
3 Agreement. CITY shall approve such assignment within 45 days of such notice from AUTHORITY,
4 unless CITY reasonably determines that the proposed assignee cannot meet the obligations of this
5 Agreement. AUTHORITY shall provide such additional information as is reasonably required by
6 CITY to make its determination.

7 **ARTICLE 15. SUBCONTRACTING**

8 AUTHORITY may, in its sole discretion, enter into contracts with third parties to perform any
9 of its obligations under this Agreement, provided that AUTHORITY notifies CITY of such contract
10 prior to entering into a contract with any contractor. AUTHORITY shall include in such contracts the
11 obligation of the contractor to comply with all applicable terms of this Agreement, including without
12 limitation insurance and indemnity requirements. Notwithstanding the foregoing, AUTHORITY shall
13 remain primarily responsible for performance of all obligations and exercise of all rights assigned to
14 AUTHORITY under this Agreement.

15 **ARTICLE 16. GOVERNING LAW AND VENUE**

16 The laws of the State of California and applicable local and federal laws, regulations and
17 guidelines shall govern this Agreement. The Parties agree that Orange County, California shall be
18 the venue for any action or proceeding that may be brought in connection with this Agreement.

19 **ARTICLE 17. DISPUTE RESOLUTION**

20 All disputes arising under this Agreement shall be resolved in accordance with the dispute
21 resolution process in this article. The Parties shall diligently cooperate with each other in an effort to
22 resolve any dispute during the dispute resolution process. If a dispute arises under this Agreement,
23 either Party may file a written request with the other Party to invoke the dispute resolution process.
24 Upon receipt of such a request each Party shall designate a staff representative, which
25 representatives shall meet within 14 days of the date of the written request in an effort to resolve the

1 dispute. If the dispute has not been resolved within 14 days or any extension thereof mutually
2 agreed upon by the Parties, the dispute shall be referred to each Party's Executive Director, who
3 shall meet within 14 days of the referral in an effort to resolve the dispute. If the Executive Directors
4 are unable to resolve the dispute within 14 days or any extension thereof mutually agreed upon by
5 the Parties, then the dispute shall be referred to the AUTHORITY's Chief Executive Officer and the
6 CITY's City Manager, who shall meet within 14 days of the referral in an effort to resolve the
7 dispute. If the dispute remains unresolved within such 14 days or any extension thereof mutually
8 agreed upon by the Parties, either Party may initiate litigation.

9 **ARTICLE 18. LITIGATION FEES**

10 Should any litigation arise out of this Agreement for the performance thereof, each Party
11 shall be responsible for its own costs and expenses, including attorney's fees.

12 /

13 **ARTICLE 19. NOTICES**

14 Any notices, requests, or demands made between the Parties pursuant to this Agreement
15 shall be in writing and delivered by certified mail. Phone and email may be used for convenience
16 but are not considered as official notice. Notices are to be directed as follows:

<p>17 To CITY: 18 City of Santa Ana 19 20 Civic Center Plaza 20 P.O. Box 1988 21 Santa Ana, CA 92701</p>	<p>To AUTHORITY: Orange County Transportation Authority 550 South Main Street P.O. Box 14184 Orange, CA 92863-1584</p>
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<p>ATTENTION: Maria D. Huizar Clerk of the Council Tel. (714) 647-6520</p>	<p>ATTENTION: Bridget Carman Senior Contract Administrator Contracts Administration and Materials Management Tel: (714) 560-5478 E-Mail: bcarman@octa.net</p>
<p>Cc: Fred Mousavipour Executive Director, Public Works Agency Tel: (714) 647-5654 E-Mail: fmousavipour@santa-ana.org Cc: City Attorney</p>	<p>Cc: Jim Bell Executive Director, Capital Programs Tel: (714) 560-5646 E-Mail: JBeil@octa.net</p>

ARTICLE 20. AMENDMENTS

This Agreement may be modified or amended only by a written document executed by both the AUTHORITY and the CITY. Such document shall expressly state that it is intended by the Parties to amend specifically identified terms and conditions of this Agreement.

ARTICLE 21. INCORPORATION OF EXHIBITS

This Agreement in its entirety includes the Exhibits listed below, all of which are, by this reference, incorporated herein and made part hereof as though fully set forth. The Exhibits of this Agreement are:

EXHIBIT A – CITY ROW

EXHIBIT B – USE OF CITY ROW

EXHIBIT C – CONTROLLED WORK ACCESS ZONE

CITY OF SANTA ANA

ORANGE COUNTY TRANSPORTATION AUTHORITY

COOPERATIVE AGREEMENT NO. C-6-1433

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By: _____
Gerardo Mouet
Acting City Manager

By: _____
Darrell Johnson
Chief Executive Officer

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By: John M. Frank
for
Sonia Carvalho
City Attorney

By: _____
James M. Donich
General Counsel

APPROVAL RECOMMENDED:

APPROVAL RECOMMENDED:

By: _____
Fred Mousavipour
Executive Director, Public Works Agency

By: _____
Jim Beil
Executive Director, Capital Programs

Dated : _____

Dated : _____

ATTEST:

By: _____
Maria D. Huizar
Clerk of the Council

Dated : _____

LIST OF EXHIBITS

- Exhibit A – CITY ROW
- Exhibit B – Use of City ROW
- Exhibit C – Controlled Work Access Zone

CITY ROW

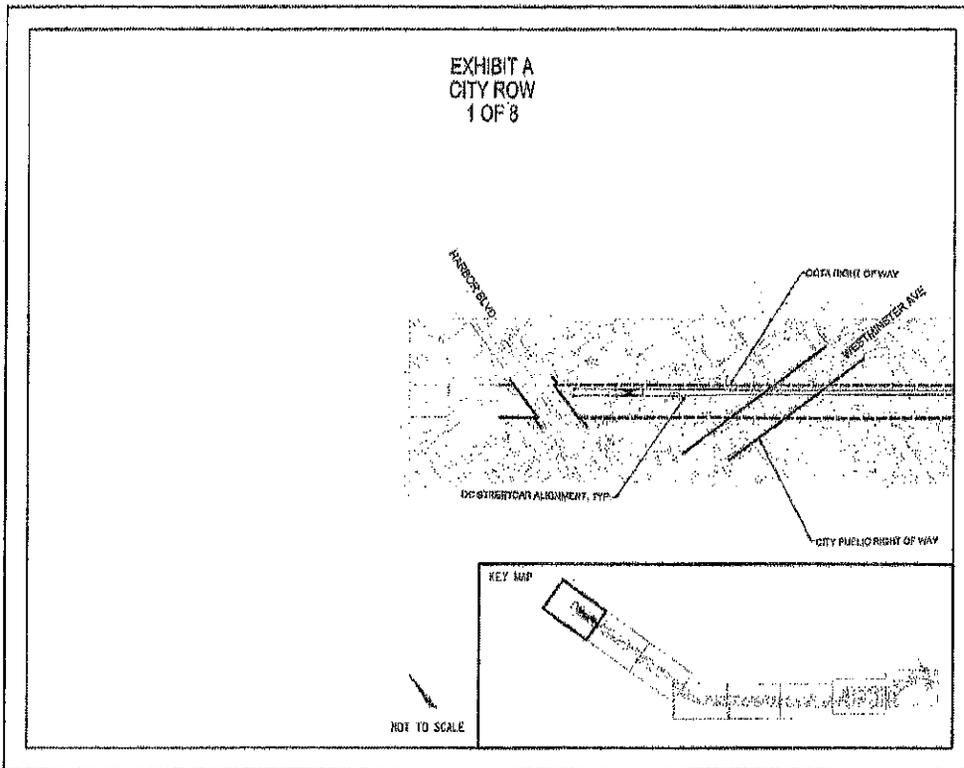


Exhibit A
Page 1

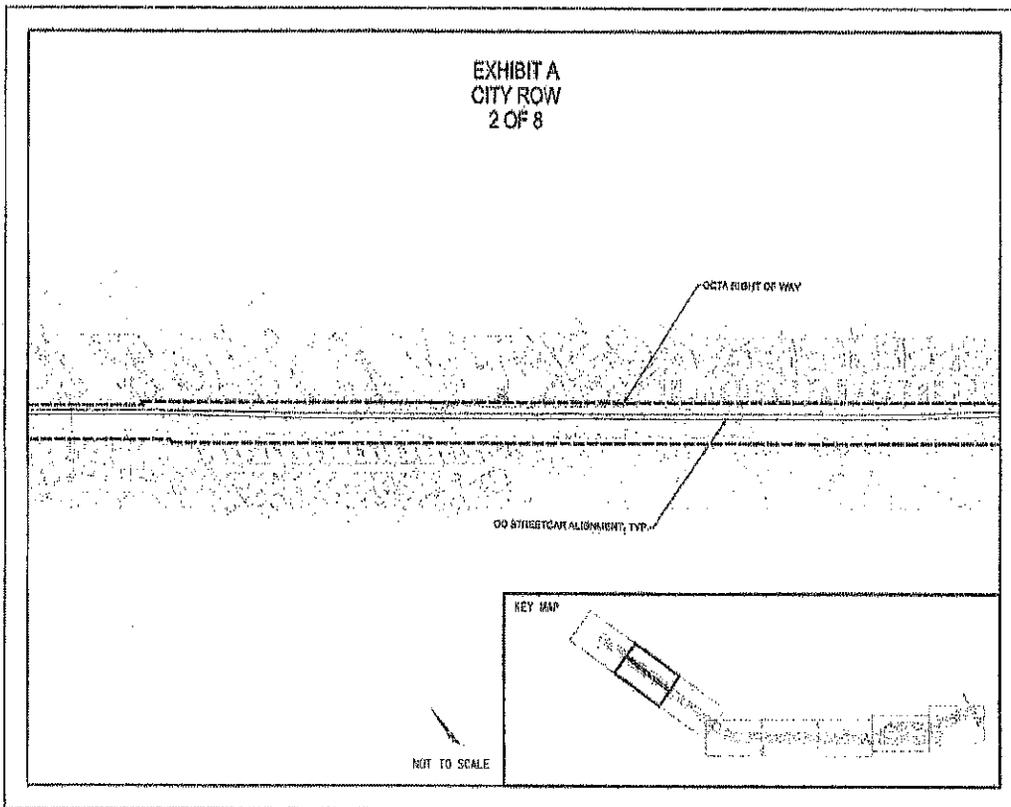


Exhibit A
Page 2

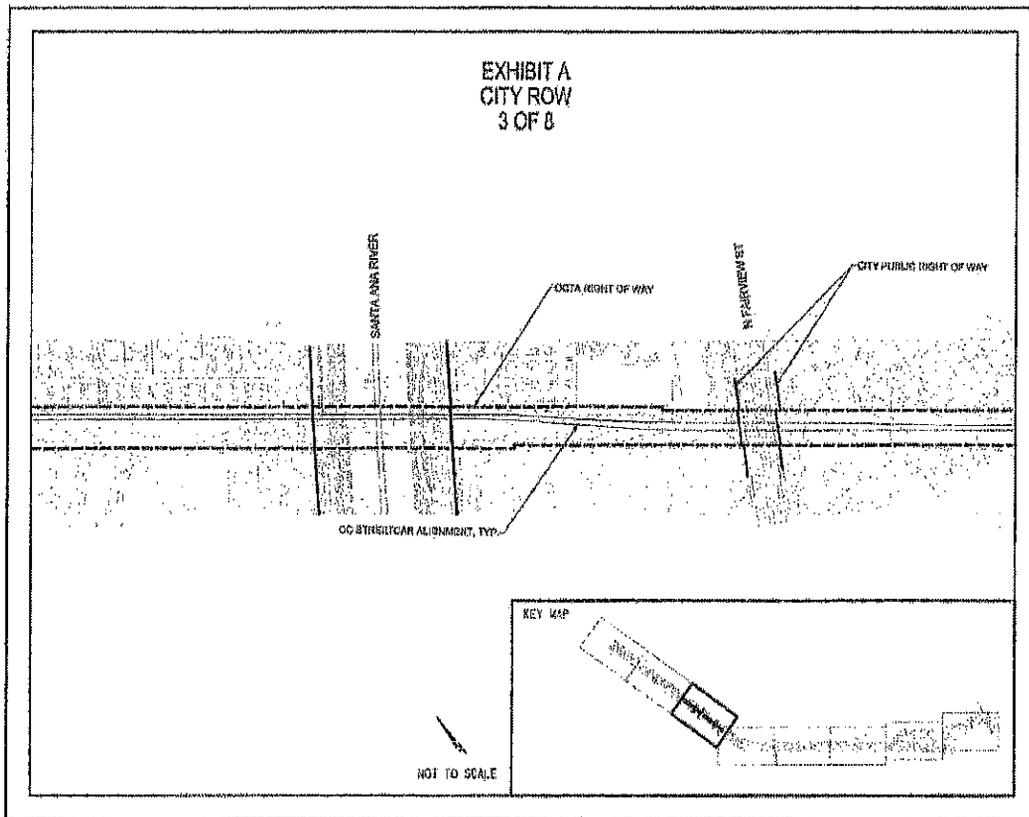


Exhibit A
Page 3

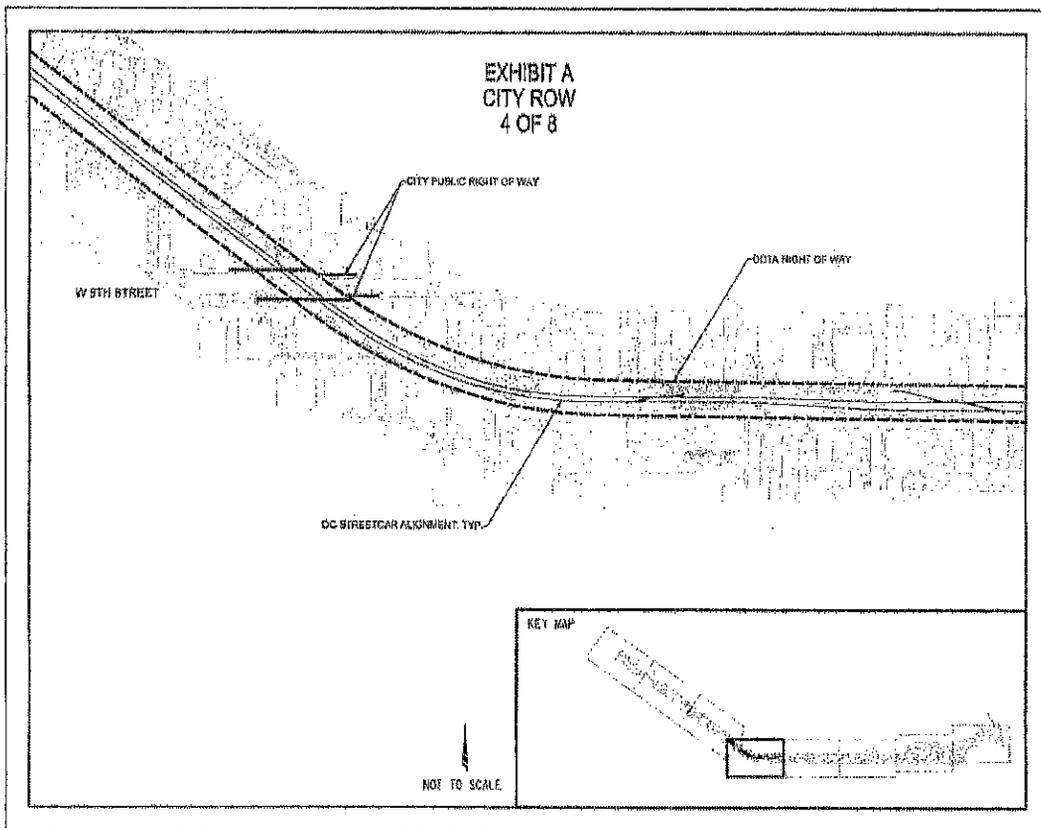


Exhibit A
Page 4

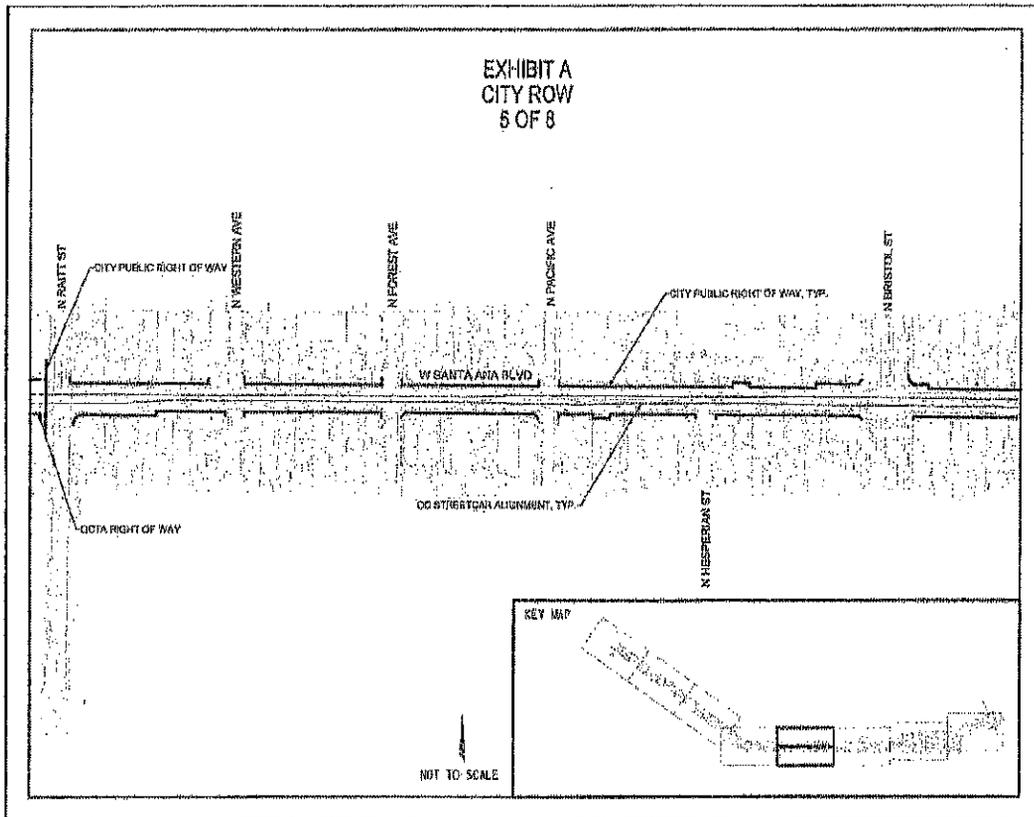


Exhibit A
Page 5

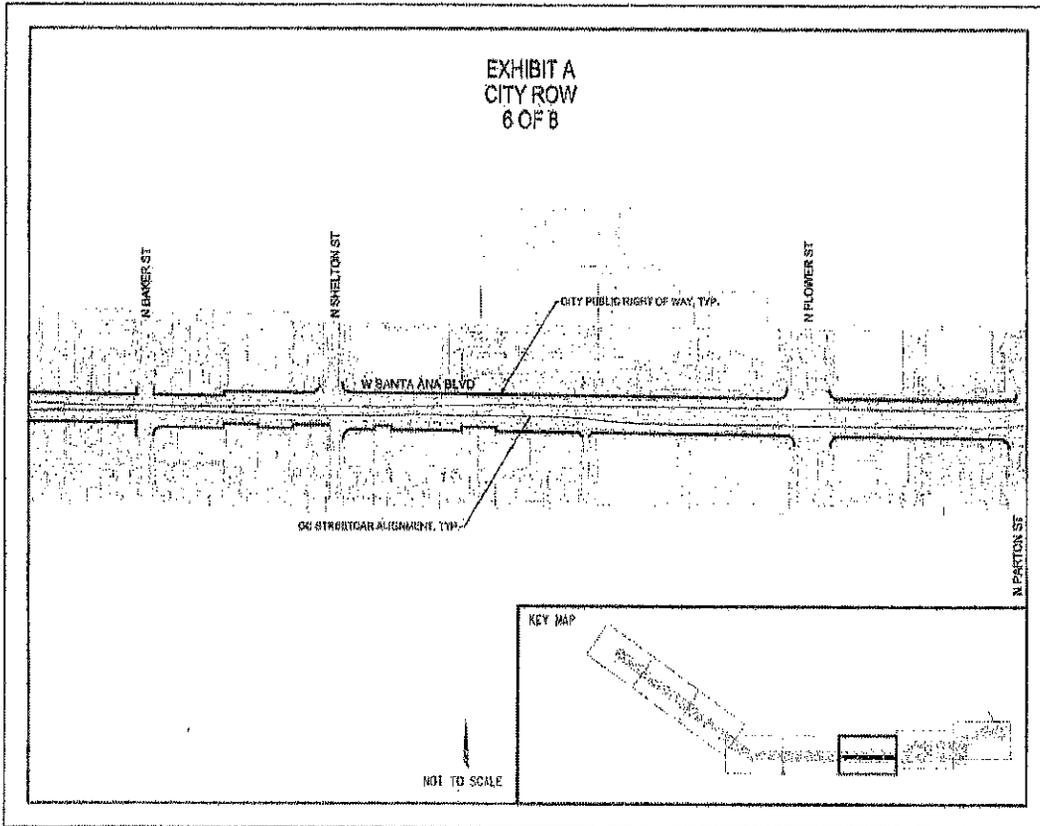


Exhibit A
Page 6

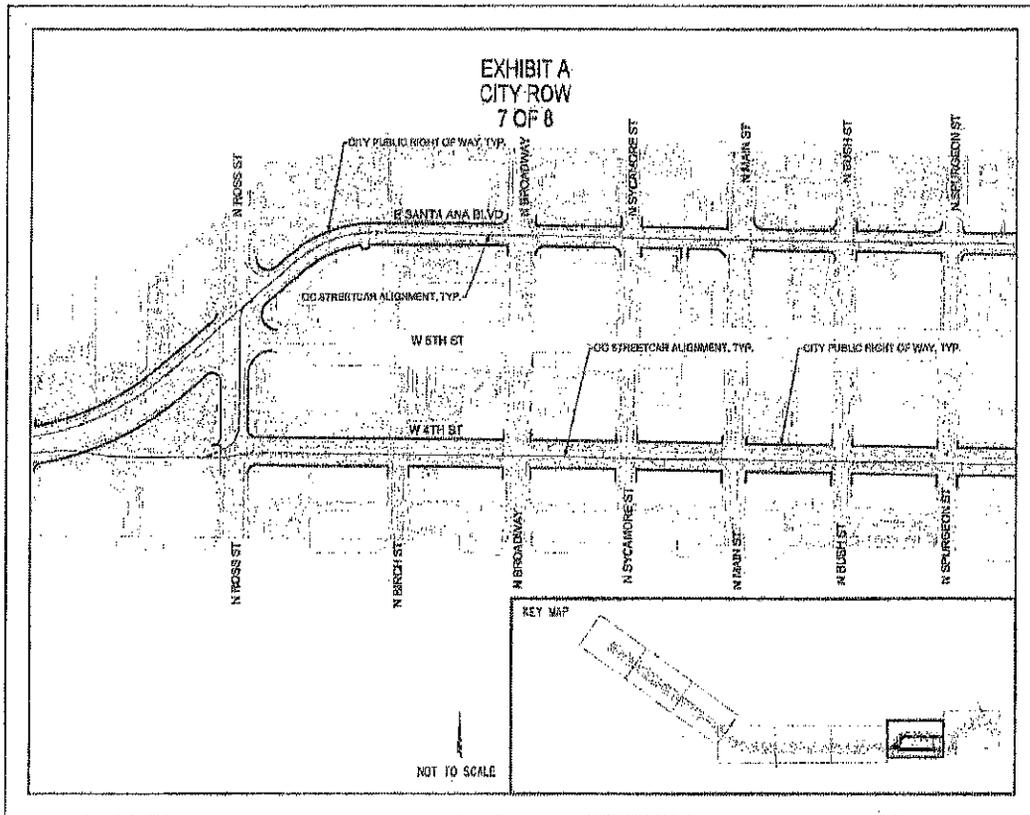


Exhibit A
Page 7

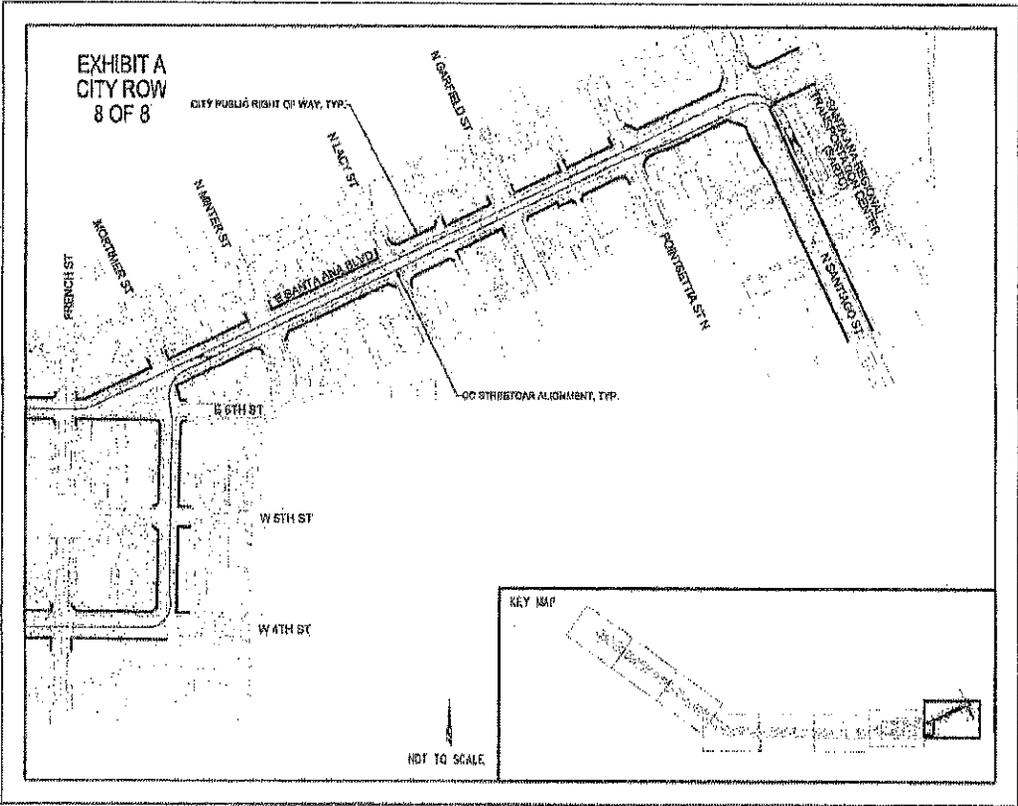


Exhibit A
Page 8

USE OF CITY RIGHT OF WAY

1.0 DEFINITIONS

All capitalized terms used in this Exhibit B shall have the same meaning ascribed to them in Article 1 of the Agreement.

2.0 USE OF CITY ROW

A. CITY hereby grants to AUTHORITY a non-exclusive use of the City ROW, necessary to accommodate the construction of the OC Streetcar Project and the operation and maintenance of the OC Streetcar System. Authority Use Rights shall be limited to the terms, conditions, limitations and restrictions contained in this Agreement.

B. The location and extent of the City ROW which may be utilized by the AUTHORITY for the construction of the OC Streetcar Project and the operation and maintenance of the OC Streetcar System, and the scope and nature of such use, shall be governed by this Agreement, the Design Agreement, Construction Agreement, Plans and Specifications, Operations and Maintenance Agreement and in accordance with the Project Submittals.

C. The CITY has previously granted licenses or permits affecting all or portions of the City ROW to persons and/or entities not a party to this Agreement which may impact the Authority Use Rights. Nothing contained in this Agreement shall be construed as granting AUTHORITY any rights or claims for damages against the CITY relating in any way to the existence of any such licenses or permits. To the extent that CITY may be required to grant a license, permit, or other rights in City ROW it shall notify AUTHORITY of any planned use which could potentially impact AUTHORITY's operations and cooperate with AUTHORITY to implement terms for such use to eliminate, to the extent practicable, any such impacts.

D. The CITY may use the Occupied City ROW for its own purposes, but only to the extent that such use does not materially interfere with Authority Use Rights. To the extent the City uses the Occupied City ROW for its own purposes, it shall notify AUTHORITY of any planned use

which could potentially impact AUTHORITY'S operations and cooperate with AUTHORITY to implement terms for such use to eliminate, to the extent practicable, any such impacts.

E. The Authority Use Rights are exclusive to the AUTHORITY and AUTHORITY shall not assign except as provided in this Agreement any interest, rights or benefits in City ROW that is the subject of this Agreement, and shall not sublease, sell utility or other telecommunication permits, licenses, franchises, excess capacity easements or in any way use City ROW for any purpose other than as specifically described in this Agreement.

F. The Authority Use Rights shall not be subject to any franchise fee, license fee, rental charge or any other such fee or charge for AUTHORITY's use of the City ROW for the OC Streetcar System operations and routine maintenance activities. This shall not preclude the CITY from charging fees for plan checks, inspections or other types of services on routine maintenance involving lane closures and capital improvement projects the AUTHORITY initiates in amounts that it charges other persons for similar services.

3.0 COORDINATION OF ADJACENT PROJECTS

The CITY agrees to keep the AUTHORITY informed on projects, outside of the City ROW, that CITY determines may interfere with the Project or OC Streetcar System, to the extent CITY is aware of such projects. This includes, but is not limited to, utility projects, communication projects, development projects, and other improvement projects.

4.0 OPERATIONS AND MAINTENANCE

Operations and maintenance activities will be as agreed in the Operations and Maintenance Agreement entered into between the CITY and AUTHORITY.

5.0 FUTURE STREETCAR CONSTRUCTION BY AUTHORITY

The AUTHORITY agrees that the CITY shall have the right to review and approve all future additions, changes and alterations to, and modifications and replacements of, any OC Streetcar System improvements on Occupied City ROW which would materially change the OC Streetcar

System or Authority Use Rights. The AUTHORITY shall not make such additions, changes, alterations, modifications or replacements without first obtaining written approval from the CITY.

6.0 FUTURE PROJECTS IMPACTING STREETCAR

The CITY agrees that the AUTHORITY shall have the right to review and approve all future additions, changes and alterations to, and modifications and replacements of, CITY and third party facilities or use thereof which would materially interfere with the AUTHORITY's operation of the OC Streetcar System or otherwise adversely affect the rights of the AUTHORITY under this Agreement. Subject to any requirement by law for the CITY to act, the CITY shall not issue permits, licenses or other authorizations to third parties which would materially interfere or otherwise adversely affect the rights of the AUTHORITY without first obtaining written approval from the AUTHORITY, which approval shall not be unreasonably withheld.

7.0 OC STREETCAR CONTROLLED WORK ACCESS ZONE

All work activities, either those of the CITY or third parties, within the controlled work access zone limits depicted and described in Exhibit C, require a permit issued by the AUTHORITY prior to work commencing. The CITY shall not issue any permits to any third parties to work in the City ROW, within the controlled work access zone depicted and described in Exhibit C, without prior evidence of a current AUTHORITY access permit. The specific rules and regulations related to such AUTHORITY access permits shall be delineated in a future agreement between the Parties.

8.0 TRAFFIC REGULATIONS

Streetcar vehicles traveling on CITY streets shall be subject to all generally applicable speed limits and other traffic control ordinances and regulations, consistent with state and federal law.

9.0 DUTY TO RESTORE

Upon the expiration of this Agreement, or earlier termination or partial termination of Authority Use Rights and/or this Agreement, all OC Streetcar System Improvements located on Occupied City ROW as to which Authority Use Rights have been terminated shall, at the option of

COOPERATIVE AGREEMENT NO. C-6-1433
EXHIBIT B

the CITY, as to any or all of the OC Streetcar System improvements, be removed by the AUTHORITY, and the Occupied City ROW shall be restored to a condition consistent with CITY standard plans and the then current condition of adjoining streets or other public facilities with respect to grade, appearance, quality, finish, and type of construction, at the sole cost and expense of the AUTHORITY. Restoration shall be performed within one hundred eighty (180) days of such expiration or termination, or such longer period as shall be required by the nature of the work and agreed to by the CITY and the AUTHORITY. For any improvements left intact at the option of the CITY, CITY shall retain all ownership and possession thereof at no cost to CITY.

CONTROLLED WORK ACCESS ZONE

