

## **AHSC IMPLEMENTATION AND MUTUAL INDEMNITY AGREEMENT (Bay Fair Apartments)**

THIS AHSC IMPLEMENTATION AND MUTUAL INDEMNITY AGREEMENT (the “Agreement”) is made and entered into as of XXXX between the San Francisco Bay Area Rapid Transit District, a rapid transit district pursuant to Public Utilities Code Section 28500 et seq., (“District” or “BART”), City of San Leandro, a California charter city and municipal corporation (“City”) and Pacific West Communities, Inc., an Idaho Corporation (“Developer,” and collectively with the District and the City, the “Parties,” or individually, a “Party”) upon the basis of the following facts, understanding, and intentions of the parties:

- The State of California, the Strategic Growth Council (“SGC”) and the Department of Housing and Community Development (“HCD”) issued a Notice of Funding Availability dated January 19, 2024 (the “AHSC NOFA”), under the Affordable Housing and Sustainable Communities (“AHSC”) Program established under Division 44, Part 1 of the Public Resources Code, commencing with Section 75200.
- Developer and City, as co-applicants, are applying for AHSC funds in response to the AHSC NOFA to provide funding for: (A) construction of the Bay Fair Apartments affordable housing project in California, to be constructed by the Developer (the “Housing Project”); (B) the provision of certain sustainable transportation infrastructure by the District (the “BART STI Improvements”); (C) the construction of certain transportation-related amenities by the District (the “BART TRA Improvements”); (D) the construction of certain transportation-related improvements to be constructed by other parties (“Non-BART Transportation Projects”); and (E) certain costs related to purchase of BayPass for Housing Project residents and other programs (the “AHSC Programs”). These improvements are described in more detail in the final application to be submitted by March 19, 2024 (collectively, the “AHSC Application”).
- The AHSC Application seeks an award to the Developer in an aggregate amount of up to \$50,000,000 in AHSC funds consisting of: (A) not to exceed \$35,000,000 of AHSC loan funds for a permanent loan (“AHSC Loan”) which will be disbursed to a limited partnership to be formed later (the “Partnership”), for the construction of the Housing Project; (B) \$0 of AHSC grant funds for the purpose of reimbursing the cost of the BART STI Improvements; (C) \$1,502,062 of AHSC grant funds for the purpose of reimbursing the cost of the BART TRA Improvements; (D) up to \$8,166,259 of AHSC grant funds for the purpose of reimbursing the cost of the Non-BART Transportation Projects; and up to (E) \$1,800,000 of AHSC grant funds for reimbursing the costs of the AHSC Programs. The AHSC grants shall be referred to collectively as the “AHSC Grants.” The AHSC Loan and the AHSC Grants are collectively referred to herein as the “AHSC Financing.”
- The District, Developer, and the City are required to enter into this Agreement

in order to comply with the specific AHSC Program Threshold Requirement stated in Section 106(a)(12)(A) of the 2024 AHSC Program Guidelines dated December 14, 2023 (the “Transportation Agency Prior Experience Threshold Requirement”). This section of the guidelines dictates that applicants must demonstrate prior experience by providing evidence of at least two prior projects that are similar to the proposed AHSC project in scope and size, which have been completed by the applicant, or joint applicant, during the ten (10) years preceding the application due date. This section of the guidelines also states that the applicants may demonstrate the requisite experience by using the past experience of work completed of a non-applicant so long as the applicants can provide an executed agreement with that specific non-applicant for the completion of the related work in the AHSC Application for which funding is sought. The purpose of this Agreement is to, amongst other things, comply with the Transportation Agency Prior Experience Threshold Requirement.

- The District is a non-applicant, but, as set forth herein, will have obligations to perform the following specific BART STI Improvements and BART TRA Improvements, included in the AHSC Application (collectively, the “Transit Obligations”):

- BART STI Improvements: Not applicable
- BART TRA Improvements: BART will (a) as part of a project to replace and modernize all of BART's platform display signs, replace signs at Bay Fair BART station. These new next generation passenger information train destination sign units (DSU) are to be future-proof, modular, with mechanisms to monitor the health of the display hardware, (b) purchase and install signs to improve customer experience with wayfinding, loading, and parking, and (c) upgrade the station lighting to LEDs.

- The District can demonstrate prior experience and provide evidence of at least two prior projects that are similar in scope and size which have been completed during the ten (10) years preceding March 19, 2024. Below is a list of these projects:

- TRA. Concord BART Station Plaza Improvements: An upgrade of the exterior public spaces surrounding the Concord BART station entrance for a more context-sensitive design that improves the safety and livability of the station area. The project improved multimodal transfer waiting areas and enhanced pedestrian and bicycle connections to surrounding neighborhoods. Areas improved included the existing plaza and pedestrian paseo to the west of the station, bus transfer area, station entrance and ticket vending area, and pedestrian connections east of the station. Completion date: July 27, 2018.

- TRA. Warm Springs/South Fremont Station: As part of the overall station construction, installation of bicycle lockers and racks, wayfinding, pedestrian-scale lighting, and continuous canopies along the bus intermodal that serve as bus shelters. Project cost: ~\$90M. Completed: March 2017.

• Subject to receipt of an award of the AHSC Financing, the District shall be responsible for completing the Transit Obligations, and for all costs and expenses related thereto, and Developer shall be responsible for constructing and developing the Housing Project and for providing the AHSC Programs (together, the “Developer Obligations”), and for all costs and expenses related thereto. In connection with the AHSC Grants and AHSC Loan, Developer is required to enter into standard agreements, reimbursement agreements, and regulatory agreements with HCD where Developer will be liable for the full and timely performance by the parties to complete the obligations set forth therein, including completion of the Developer Obligations, Transit Obligations, and Non-BART Transportation Projects, as described in the AHSC Application. The AHSC Application and all standard agreements, reimbursement agreements, regulatory agreements and any other agreements required by HCD in connection with the AHSC Financing shall be collectively referred to herein as the “AHSC Documents.”

• The District and Developer each acknowledge and agree that the inability or failure by either party to fully and timely complete each party’s respective improvements required by the AHSC Documents may affect the timing and right of the other party to receive reimbursement of AHSC funds due the other party notwithstanding the other party’s full and timely performance of its obligations.

NOW, THEREFORE, in consideration of the recitals, covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

#### AGREEMENT

• Site Control. The District hereby represents and warrants that it controls the Transportation Property through fee title ownership.

• Obligations. The District shall, in its sole responsibility, complete the Transit Obligations in accordance with the terms of the AHSC Documents and the approved design and construction documents and in accordance with the terms of this Agreement. The Developer shall, in its sole responsibility, complete the Developer Obligations in accordance with the terms of the AHSC Documents and the approved design and construction documents. Each Party will provide the other Party with copies of all requisitions for work related to their respective work, the notice of completion, and other documents related to their respective work that another party may reasonably request.

- District Indemnity. District is responsible for carrying out the Transit Obligations using AHSC grant proceeds in accordance with the AHSC Documents, including, but not limited to, any disbursement deadlines contained therein. District shall indemnify, defend, and hold harmless Developer and City, and its elected and appointed officials, affiliates, directors, officers, partners, members, agents and employees (each, an “Developer Indemnified Party” and “City Indemnified Party”) against any and all claims, actions, demands, suits, causes of action, losses, liabilities, injuries, costs, damages, or expenses (collectively, “Claims”), including, without limitation, any direct, indirect or consequential loss, liability, damage, or expense, court costs and attorneys’ fees, arising out of or in connection with the District’s performance of or failure to perform its obligations to complete the Transit Obligations, in the manner and within the time periods set forth in the AHSC Documents, including any claims, losses or liabilities caused by said failure to perform that results in a default under the AHSC Loan. However, in no event shall the Developer Indemnified Party or the City Indemnified Party be indemnified hereunder for any Claims to the extent said Claims result from such party’s gross negligence or willful misconduct. District agrees to pay all of the Developer Indemnified Party’s and the City Indemnified Party’s costs and expenses, including but not limited to reasonable attorneys’ fees, which may be incurred in any effort to enforce any term of this Agreement, caused by a District breach of the Agreement, including, but not limited to, all such costs and expenses which may be incurred by any Developer Indemnified Party and the City Indemnified Party in any legal action, mediation, or arbitration proceeding brought by HCD or other third party.

- Developer Indemnity. Developer is responsible for carrying out the Developer Obligations using AHSC Financing in accordance with the AHSC Documents, including, but not limited to, any disbursement deadlines contained. Developer shall indemnify, defend, protect, and hold harmless the District and its affiliates, directors, officers, partners, members, agents and employees (each, an “District Indemnified Party”) and the City Indemnified Party against any and all Claims, including, without limitation, any direct, indirect or consequential loss, liability, damage, or expense, court costs and attorneys’ fees, arising out of or in connection with Developer’s performance of or failure to perform its Developer Obligations to complete construction and development of the Housing Development, in the manner and within the time periods, and to otherwise perform any covenants, set forth in the AHSC Documents including any claims, losses or liabilities caused by said failure to perform that results in a default under the AHSC Loan. However, in no event shall the District Indemnified Party or the City Indemnified Party be indemnified hereunder for any Claims to the extent said Claims result from such party’s gross negligence or willful misconduct. Developer agrees to pay all of the costs and expenses of the District Indemnified Party and the City Indemnified Party, including but not limited to reasonable attorneys’ fees, which may be incurred in any effort to enforce any term of this Agreement, caused by a Developer breach of the Agreement, including, but not limited to, all such costs and expenses which may be incurred by any District Indemnified Party and City Indemnified Party in any legal action, mediation, or arbitration proceeding brought by HCD or other third party.

- City Indemnity. City is responsible for HCD fund disbursement to the District (“City Obligations”). City shall indemnify, defend, protect, and hold harmless the District Indemnified Party and Developer Indemnified Party against any and all Claims, including, without limitation, any direct, indirect or consequential loss, liability, damage, or expense, court costs and attorneys’ fees, arising out of or in connection with City’s performance of or failure to perform its City Obligations, in the manner and within the time periods, and to otherwise perform any covenants, set forth in the AHSC Documents including any claims, losses or liabilities caused by said failure to perform that results in a default under the AHSC Loan. However, in no event shall the District Indemnified Party or the Developer Indemnified Party be indemnified hereunder for any Claims to the extent said Claims result from such party’s gross negligence or willful misconduct. City agrees to pay all of the costs and expenses of the District Indemnified Party and the Developer Indemnified Party, including reasonable attorneys’ fees, which may be incurred in any effort to enforce any term of this Agreement, caused by a City breach of the Agreement, including, but not limited to, all such costs and expenses which may be incurred by any District Indemnified Party and Developer Indemnified Party in any legal action, mediation, or arbitration proceeding to enforce the terms of this Agreement.

- Schedule of Performance; Progress Reports. Developer and District shall comply with the schedule of performance set forth in Exhibit A attached hereto for the completion of their respective obligations hereunder (the “Schedule of Performance”). The District and Developer agree to give the other Party a written quarterly status report on the progress toward the milestones listed in Exhibit A, i.e., the Developer will report on the Developer’s progress on the Housing Project and the District will report on the District’s progress on the BART STI Improvements and BART TRA Improvements. If any Party anticipates not meeting the targeted construction and grant disbursement milestones as established in the AHSC Documents, that Party will promptly notify the other Party in writing and will meet with the other Party to discuss the reasons why the milestone dates may not be met and what actions the delayed Party intends to take to meet the milestones or otherwise rectify the work schedule in order to maintain good standing with the terms and conditions established in the AHSC Documents.

- Delegation. Notwithstanding the obligations of each Party under this Agreement, each Party shall be entitled to enter into sub-agreements with each other or with other parties to provide any assistance or services needed for each Party to perform its obligations under this Agreement and the AHSC Documents.

- Cost Overruns. Developer shall be responsible for paying all costs required to complete the Developer Obligations, irrespective of whether such costs exceed the AHSC Loan. District shall be responsible for paying all costs required for the Transit Obligations, irrespective of whether such costs exceed the portion of the AHSC Grants designated for the Transit Obligations. City shall have no obligation to pay costs to complete the Developer Obligations or Transit Obligations irrespective of whether such costs exceed the relevant portions of the AHSC Grants or AHSC Loan.

- Billing and Payment Procedure: The District shall submit to City all reimbursement requests in the form of monthly invoices for the costs associated with the BART STI Improvements and the BART TRA Improvements. Invoices will include backup documentation as required by HCD and a cover sheet indicating the budget line item from which each cost shall be drawn. Once the AHSC Grant Disbursement Agreement is executed, City shall submit corresponding reimbursement requests to HCD within 30 days of its receipt of District's invoice (or such later date as may be required by HCD, but in any event within 45 days after the City's receipt of the District's invoice), and thereafter disburse to the District any such funds received from HCD within 30 days of receipt. Failure of the City to timely submit the District reimbursement requests to HCD or to disburse any funds received from HCD within 30 days of receipt for the BART STI Improvements or BART TRA Improvements to the District shall be a default under this Agreement and shall excuse the District from performance of the BART STI Improvements or BART TRA Improvements.

- Implementation Agreements. In the event a grant award is received from AHSC, the Parties recognize that each Party may need additional assurances from another Party (including assurances for the Housing Project's lenders and investors) regarding the AHSC Grant and AHSC Loan before commencement of construction of the Housing Project, the BART STI Improvements, and the BART TRA Improvements. The Parties agree to cooperate with each other to reach timely mutual agreement on amendments to this Agreement, other implementation agreements or estoppel certificates necessary to provide reasonable assurances and indemnifications related to the disbursement of AHSC Grant funds. The Parties recognize that any such amendments to this Agreement or execution of additional agreements may require approval of the City's Council, District's Board of Directors and Developer's Board of Directors.

- Notices. All notices required hereunder, demands, and communications between the Parties shall be sufficiently given if, and shall not be deemed given unless, dispatched by United States registered or certified mail, or other form of mail which offers proof of mailing, postage prepaid, and return receipt requested, or delivered by express delivery service and return receipt requested, or delivered personally, to the principal office of the Parties as follows:

District: Carli Paine  
Group Manager, Property Development  
BART  
2150 Webster St., 9<sup>th</sup> floor  
Oakland, CA 94612  
510-912-0331  
[Carli.paine@bart.gov](mailto:Carli.paine@bart.gov)

Developer: Caleb Roope  
President & CEO

Pacific West Communities, Inc.  
430 E. State Street, Suite 100  
Eagle, Idaho 83616  
208-461-0022  
[calebr@tpchousing.com](mailto:calebr@tpchousing.com)

City: Frances Robustelli  
City Manager  
City of San Leandro  
835 E. 14th Street  
San Leandro, CA 94577  
(510) 577-3319  
[frobustelli@sanleandro.org](mailto:frobustelli@sanleandro.org)

Any such notice or communication shall be deemed to have been given on (i) the day such notice or communication is personally delivered, (ii) three (3) days after such notice or communication is mailed by prepaid certified or registered mail, (iii) one (1) business day after such notice or communication is sent by overnight courier.

- Events of Default. The occurrence of any of the following events shall constitute an Event of Default under this Agreement:
  - A Party fails to perform any of its obligations under this Agreement, and does not cure such failure within thirty (30) days after written notice of such failure has been delivered to the defaulting Party in accordance with Section 11 above; or
  - A Party purports to revoke this Agreement prior to termination.
- Termination. This Agreement shall terminate upon the earlier of: (i) completion of all obligations under the AHSC Documents; or (ii) mutual agreement of the Parties hereto.
- Third Party Beneficiary. The Partnership shall be an express third party beneficiary of this Agreement and shall be entitled to enforce the provisions hereof as if it were a party to this Agreement.
- Assignment. District hereby acknowledges and approves the assignment by Developer and the Partnership to the Housing Project's senior lender ("Construction Lender") of all of their respective right, title and interest in, to and under the Agreement (the "Collateral") as collateral security for the Partnership's obligations to Construction Lender under, and in connection with Construction Lender's loan to the Partnership. In the event Construction Lender forecloses upon the Collateral, District hereby agrees that Construction Lender shall have all of Developer's rights and interests under the Agreement. Construction Lender is hereby made an express third party beneficiary of this

Section 15.

- Miscellaneous.

- Nothing in this Agreement shall be construed to limit any claim or right which any Party may otherwise have at any time against an Indemnitor or any other person arising from any source other than this Agreement, including any claim for fraud, misrepresentation, waste, or breach of contract other than this Agreement, and any rights of contribution or indemnity under any federal or state environmental law or any other applicable law, regulation, or ordinance.

- If any Party delays in exercising or fails to exercise any right or remedy against a Party, that alone shall not be construed as a waiver of such right or remedy, or deprive any such Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies. A Party may specifically and expressly waive in writing any condition or breach of this Agreement by the other Party, but no such waiver shall constitute a further or continuing waiver of any preceding or succeeding breach of the same or any other provision. Consent by one Party to any act or failure to act by the other Party shall not be deemed to imply consent or waiver of the necessity of obtaining such consent for the same or similar acts or failures to act in the future. All remedies of any Party against the other Party are cumulative.

- This Agreement shall be binding upon and inure to the benefit of each of the Parties hereto and their respective representatives, heirs, executors, administrators, successors, and assigns. This Agreement may not be amended except by a written instrument executed by the Parties hereto, and subject to approval as necessary pursuant to Section 10.

- This Agreement shall be deemed to have been delivered and accepted in the State of California and governed exclusively by the internal substantive laws of the State of California as the same may exist at the date hereof. The Parties hereto agree that any action hereon between the parties and their successors in interest may be maintained in a court of competent jurisdiction located in the State of California, and consent to the jurisdiction of any such California court for the purposes connected herewith.

- Each Party hereto intends that this Agreement shall not benefit or create any right or cause of action in or on behalf of any person other than the Parties hereto.

- This Agreement may be executed in multiple counterpart copies, any one of which when duly executed, with all formalities hereof, shall be fully binding and effective as the original of this Agreement.

- This Agreement shall be effective as of the date first written above,



provided however that in the event that the parties do not receive an award of the AHSC Funds, this Agreement shall automatically terminate and be of no further force or effect.

*[Signatures on following page]*

**District:**

San Francisco Bay Area Rapid Transit District,  
a rapid transit district

By: \_\_\_\_\_  
Name: Val Menotti  
Its: Chief Planning & Development Officer

**Developer:**

Pacific West Communities, Inc.,  
an Idaho corporation

By: \_\_\_\_\_  
Name: Caleb Roope  
Its: President & CEO

**City:**

City of San Leandro,  
a California charter city and municipal corporation

By: \_\_\_\_\_  
Name: Frances Robustelli  
Its: City Manager

## **EXHIBIT A**

### **Schedule of Performance**

#### **BART:**

##### *BART TRA Improvements*

<b>Performance Milestone</b>	<b>Date</b>
Begin construction	July 1, 2025
Complete construction	December 31, 2027
All funds fully disbursed	December 31, 2027

#### **Developer:**

<b>Performance Milestone</b>	<b>Date</b>
Execute Standard Agreement for AHSC Grants	July 1, 2025
Execute Disbursement Agreement for AHSC Grants	December 1, 2025
Begin construction of Housing Project	December 1, 2025
Complete construction and obtain Certificate of Occupancy	July 1, 2028
All funds fully disbursed	December 31, 2029

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