

## FUNDING AND SERVICES AGREEMENT

This Funding And Services Agreement (this "Agreement") dated as of November 6, 2018 (the "Effective Date"), is by and between the **Greenway Business Improvement District Corporation**, a Massachusetts not-for-profit corporation having an address of 33 Broad Street, Suite 300, Boston, MA 02109 (the "BID Corp") and the **Rose Fitzgerald Kennedy Greenway Conservancy, Inc.**, a Massachusetts not-for-profit corporation having an address of 185 Kneeland Street, Boston, MA 02111 (the "Conservancy"). The BID Corp and the Conservancy are collectively referred to herein as the "Parties".

### BACKGROUND

A. Pursuant to Chapter 306 of the Acts of 2008, as amended by Chapter 242 of the Acts of 2012 (the "Conservancy Legislation"), the Commonwealth of Massachusetts designated the Conservancy as the steward of the Rose Fitzgerald Kennedy Greenway park, which is located on land owned by the Massachusetts Department of Transportation (the "State") and is substantially above the Central Artery tunnel (the "Greenway").

B. The Conservancy's rights and obligations with respect to the operation, management, improvement and maintenance of the Greenway are more specifically set forth in that certain lease agreement by and between the State and the Conservancy dated July 1, 2017 (the "Greenway Lease").

C. Pursuant to that certain Memorandum of Understanding by and among State, the City of Boston (the "City"), the Conservancy, and A Better City acting on behalf of its Greenway Abutters Committee, dated June 19, 2017 (the "Greenway BID MOU"), the parties thereto agreed to set forth a framework for certain anticipated funding contributions to the Conservancy by the State, the City, and a business improvement district to be created in accordance with M.G.L. c. 40O (the "BID Statute") for the continued operation, management, improvement and maintenance of the Greenway by the Conservancy. The funding contributions by the State and City, as reflected in the "Funding Schedule" of the Greenway BID MOU, are material preconditions for the funding contribution by the business improvement district, and similarly, the funding contribution by the business improvement district is a material precondition for the funding contributions by the State and the City.

D. The State and the Conservancy executed that certain Commonwealth of Massachusetts Subsidy Agreement dated June 30, 2017 to formally set forth the State's agreement to contribute certain cash contributions, non-cash operating support, and capital funds contributions to the Conservancy in furtherance of the Greenway BID MOU (the "Subsidy Agreement").

E. On April 25, 2018, the City of Boston City Council (the "City Council") voted to approve a business improvement district for an area in and around the Greenway, as more specifically described in the business improvement district improvement plan therefor as approved by the City Council (the "Greenway BID"). Pursuant to the Greenway BID improvement plan (as the same may be amended from time to time, the "Greenway BID Improvement Plan"), the BID Corp is the designated management entity for the Greenway BID, and shall carry out, implement, and oversee the purposes of the Greenway BID.

F. In furtherance of the Greenway BID MOU and the Greenway BID Improvement Plan, the BID Corp desires to enter into this Agreement with the Conservancy, and the Conservancy desires to enter into this Agreement, to facilitate the efficient use of public and private funds contributed to the Conservancy for the preservation, protection, maintenance, and enhancement of the Greenway as a world-class public park, and for the promotion of the business and public interests in contributing to the City's economic vitality along the Greenway.

## AGREEMENT

Now, therefore, in consideration of the mutual covenants set forth herein and other good and valuable consideration, the receipt and sufficiency is hereby acknowledged, the parties hereto agree as follows:

1. **Term.** This Agreement shall commence on the Effective Date, and shall expire on June 30, 2023 (the "Expiration Date"), subject to the termination provisions set forth in this Agreement (the "Term"), and subject further to any extensions to the Agreement entered into by the Parties.

2. **BID Funding Contributions.**

- 2.1. Greenway Services. In consideration of the BID Corp's contribution of One Million Dollars (\$1,000,000.00) per Fiscal Year during the Term (the "Greenway Services Contribution") and subject to the terms and conditions set forth in this Agreement, the Conservancy shall use best efforts, skill, judgment, and abilities, in accordance with all applicable laws, rules and regulations, to operate, manage, maintain, and improve the Greenway by providing operations, horticultural, and maintenance support services for the Greenway (collectively, the "Scope of Work"). For purposes of this Agreement, the term "Fiscal Year" shall mean the period commencing on July 1 of a given calendar year and ending on June 30 of the immediately following calendar year, and the term "Conservancy Fiscal Year" shall mean the period commencing on January 1 of a given calendar year and ending on December 31 of the same calendar year.

- 2.2. Greenway Priorities and Enhancements. In consideration of the BID Corp's contribution of up to Five Hundred Thousand Dollars (\$500,000.00) per Fiscal Year during the Term (the "Greenway Enhancements Contribution") and subject to the terms and conditions set forth in this Agreement, the Conservancy shall perform, or cause to be performed, certain improvements and/or enhancements to the Greenway as determined pursuant to this Agreement (the "Greenway Enhancements"). The Conservancy acknowledges and agrees that the Greenway Enhancements Contributions are restricted contributions of the BID Corp to be held by the Conservancy during the Term subject to the terms and provisions of this Agreement and subject further to the written direction and authorization by the BID Corp regarding the expenditure of such Greenway Enhancements Contributions, and that the Conservancy shall not have the right to use, spend, or encumber the Greenway Enhancements Contributions (or any portion thereof) without the prior written approval of the BID Corp.

- 2.3. Timing for Funding of Contributions.

- 2.3.1. The BID Corp shall deliver by wire transfer the Greenway Services Contribution in four (4) installments for each Fiscal Year (i.e., \$250,000 per quarter) (the "Greenway Services Quarterly Contribution"), and made on a quarterly basis commencing on September 1, 2018 and on the first (1<sup>st</sup>) day of each subsequent quarter (i.e., December 1, 2018, March 1, 2019, and so on), as adjusted for weekends and holidays.

- 2.3.2. The BID Corp shall deliver by wire transfer the Greenway Enhancements Contribution in four (4) installments for each Fiscal Year (i.e., \$125,000 per quarter) (the "Greenway Enhancements Quarterly Contribution"), and made on a quarterly basis commencing on September 1, 2019 and on the first (1<sup>st</sup>) day of each subsequent quarter (i.e., December 1, 2019, March 1, 2020, and so on), as adjusted for weekends and holidays. The Parties acknowledge and agree that in lieu of the Greenway Enhancements Contribution for the Fiscal Year 2019 (July 1, 2018 – June 30, 2019), the Greenway Services Contribution for such Fiscal Year 2019 shall be increased by the amount of the annual Greenway Enhancements Contribution, as contemplated pursuant to the Greenway BID MOU.

- 2.3.3. The Conservancy acknowledges that (1) the annual Greenway BID fees (the "Greenway BID Fees") are collected by the City's Collector/Treasurer department on a quarterly basis in conjunction with the collection of the City's quarterly real estate tax bills and that the City's Collector/Treasurer transfers to the BID Corp, as soon as practicable for the City's Collector/Treasurer, the collected Greenway BID Fees on a rolling basis for each fiscal quarter, and (2) that participating property owners of the Greenway BID may be delinquent, from time to time, in paying their respective assessment of the Greenway BID Fees, which in either case the actual Greenway BID Fees collected and deposited with the BID Corp may vary each fiscal quarter. In light of the foregoing, the Conservancy acknowledges and agrees that, from time to time, the Greenway Services Quarterly Contributions or the Greenway Enhancements Quarterly Contributions may not be four (4) equal installments in any given Fiscal Year.
- 2.3.4. Without limiting Section 2.3.3, the Conservancy acknowledges that the Greenway BID Fees, pursuant to the BID Statute, are calculated based on formula in relation to the City Assessing Department's real estate assessed valuations as determined by the City on an annual basis and recalculated from time to time, and that the Greenway BID Improvement Plan includes a mechanism to protect against future declines in Greenway BID Fee revenues on account of declines in taxable property assessed values. However, in the event that BID Fees revenues received by the BID Corp are insufficient to make the Greenway Services Contribution and/or the Greenway Enhancements Contribution in full for such applicable Fiscal Year (a "BID Fee Shortfall Event"), the parties acknowledge and agree that in the event of a BID Fee Shortfall Event, the following shall apply: (1) the BID Corp shall notify the Conservancy in writing as soon as practicable of an expected BID Fee Shortfall Event, (2) the BID Corp may reduce its Greenway Enhancements Contribution for the Fiscal Year in which the BID Fee Shortfall Event will occur (the "Shortfall Fiscal Year") by such amount as may be necessary to maintain the Greenway Services Contribution in full for the Shortfall Fiscal Year, (3) any reduction of the Greenway Enhancements Contribution on account of a BID Fee Shortfall Event shall not be a default of the BID Corp's obligations under this Agreement, (4) the BID Corp shall transfer to the Conservancy, in a future Fiscal Year, the amount of the applicable shortfall if the Greenway BID Fees collected in such future Fiscal Year shall exceed the total sum of the Greenway Services Contribution and the Greenway Enhancements Contribution for such future Fiscal Year (less the BID Corp's budgeted amounts for the BID Corp's administration and overhead for such Fiscal Year), and (5) the Conservancy may elect to apply any interest amount earned to date under Section 2.4 below as a credit to the applicable shortfall amount for the BID Fee Shortfall Event. The Parties acknowledge and agree that to the extent that the Greenway BID Fees collected in a future Fiscal Year do not yield any excess amounts sufficient to cover a reimbursement of a shortfall amount, then the BID Corp shall have no further obligation to transfer to the Conservancy such shortfall amount.
- 2.3.5. Notwithstanding anything to the contrary, the BID Corp's funding of the Greenway Services Contribution and the Greenway Enhancements Contribution, as specified herein, is conditioned upon (A) the State's funding of its respective funding contributions to the Conservancy as reflected in the "Funding Schedule" of the Greenway BID MOU and further set forth in the Subsidy Agreement, (B) the City's funding of its respective funding contributions to the Conservancy as reflected in the "Funding Schedule" of the Greenway BID MOU, which is to be further set forth in an agreement by and between the City and the Conservancy, and (C) the Conservancy's continued and diligent operations and financing that allows the Conservancy to operate the Greenway and perform horticultural, and maintenance services at a level consistent with the Greenway

Maintenance Standards (as defined in Section 3.1 below). In the event of failure of any of the foregoing conditions, the BID Corp may, at its sole discretion: (1) with respect to a failure of condition (A) or (B) above, deduct an amount equal to the amount of the unpaid State or City contribution from any future quarterly contribution otherwise due from the BID Corp under this Agreement, and (2) with respect to a failure of condition (C) above, deduct an amount equal to the amount that the Conservancy failed to fundraise that would have permitted the Conservancy to operate the Greenway and perform horticultural, and maintenance services at a level consistent with the Greenway Maintenance Standards from any future quarterly contribution otherwise due from the BID Corp under this Agreement, or (3) send a notice of termination to the Conservancy in accordance with Section 6.1 below.

2.3.6. In no event shall the Greenway Services Contribution or the Greenway Enhancements Contribution be used to (A) compensate the Conservancy's Executive Director, Chief of Staff, or Chief Development Officer, or (B) offset any shortfalls to the contributions by the State or the City, or shortfalls to the annual fundraising by the Conservancy.

2.3.7. Notwithstanding anything to the contrary, in the event that the BID Corp and the Conservancy have agreed upon a Greenway Enhancement that will benefit the public realm pursuant to Section 3.2, which is to be funded from the Greenway Enhancements Contribution, and the Conservancy and the BID Corp reasonably and in good faith agree that (i) the Conservancy does not have authority to perform (or would be unable to perform), or (ii) such Greenway Enhancement would otherwise be performed either more efficiently or more cost effectively by a third party than by the Conservancy, the BID Corp shall have the right to request that the Conservancy return to the BID Corp a portion of any Greenway Enhancements Contributions then being held by the Conservancy and that has not been committed or authorized to be spent in accordance with the terms of this Agreement and that is necessary to fund such Greenway Enhancement (the "Returned Enhancements Funds"). The BID Corp shall submit to the Conservancy a written request indicating the amount of the requested Returned Enhancements Funds together with a description of the target capital improvements or projects (the "Returned Enhancements Funds Request Notice"). The Conservancy shall deliver to the BID Corp by wire transfer the amount of requested Returned Enhancements Funds indicated on the Returned Enhancements Funds Request Notice within thirty (30) days from the date of the Conservancy's receipt of such notice, and the BID Corp shall expend the Returned Enhancement Funds on the identified Greenway Enhancement. To the extent the Conservancy fails to deliver to the BID Corp the requested Returned Enhancements Funds within sixty (60) days from the date of the Returned Enhancements Funds Request Notice, then the BID Corp may withhold such requested amount from a subsequent delivery of the Greenway Enhancements Quarterly Contributions until such amount is withheld by the BID Corp in full.

2.4. Investment of Greenway Enhancements Contributions. The Conservancy shall invest the Greenway Enhancements Contributions amount in an interest-bearing fund account, or such other short-term investment option reasonably available to the Conservancy as approved by the BID Corp, and all interest earned on the Greenway Enhancements Contributions shall be deemed part of the Greenway Enhancements Contributions subject to the BID Board's exclusive right to elect to apply such interest amount earned to date as a credit toward a subsequent Greenway Enhancements Quarterly Contribution. The Conservancy shall not co-mingle the Greenway Enhancements Contributions with any other funds of the Conservancy without the prior written consent of the BID Corp, and to the extent the BID Corp consents to co-mingling the Greenway Enhancements Contributions with other funds of the Conservancy, such amounts shall be invested in an interest-

bearing money market fund account, or such other short-term investment option reasonably available to the Conservancy as approved by the BID Corp, and the interest earned collectively by such amount shall be allocated on a pro rata basis. Notwithstanding the foregoing, within ninety (90) days of the Conservancy's need to expend Greenway Enhancements Contributions, the Conservancy may withdraw such funds from the segregated money market account in which the Greenway Enhancements Contributions are held, and deposit such funds in a non-interest-bearing checking account, commingled with other funds of the Conservancy, in order to facilitate the expenditure of such funds.

### **3. Performance of Services.**

3.1. The Conservancy shall carry out the Scope of Work and the Greenway Enhancements in accordance with the "Greenway Parks Maintenance Standards and Practices" adopted in 2009 or as subsequently amended by the Board of Directors of the Conservancy (the "Greenway Standards"), a copy of which is attached as **Exhibit A**.

3.2. The BID Corp reserves the right to propose to the Conservancy, from time to time, Greenway Enhancements, and the Conservancy shall otherwise develop and propose for the BID Corp's consideration Greenway Enhancements, but in all cases, the BID Corp and the Conservancy shall reasonably cooperate and collaborate with each other to consider the other Party's proposal and to identify the Greenway Enhancements, which shall in all events be consistent with the Greenway Lease and benefit or improve the public realm. The Conservancy shall not perform (or cause to be performed) any Greenway Enhancement without the prior written approval of the BID Corp made in its sole and absolute discretion.

3.3. The Conservancy shall provide, supervise, manage, and administer all services and work contemplated by this Agreement, including, without limitation, those set forth in the Scope of Work (collectively, the "Work", which term shall include all labor, materials, equipment, communication, coordination, training, supervision, and management required by this Agreement). The Conservancy shall perform the Work required by this Agreement in a diligent, efficient, and first-class manner consistent with the purposes and intentions of this Agreement. The Conservancy shall be solely responsible for, and have control over means, methods, techniques, sequences and procedures, and for the directing the performance of, and coordinating all aspects of, the Work, subject, however, to any rights of the BID Corp to review and/or inspect such Work.

3.4. All Work to be performed by contractors, subcontractors, service providers, vendors, workmen, laborers, and mechanics (collectively, the "Greenway Workforce") shall be performed so as to not disturb labor harmony, or not create labor disharmony, with the workforce or trades engaged by participating property owners of the Greenway BID. To the extent the BID Corp notifies the Conservancy that one or more of the Greenway Workforce presents a potential threat to labor harmony with the workforce or trades engaged by participating property owners of the Greenway BID, the Conservancy shall reasonably cooperate with the BID Corp in an attempt to resolve such potential threat.

### **4. Annual Programming Plan; Capital Improvements Plan; Annual Budget.**

4.1. Annual Plans. At least sixty (60) days before each Conservancy Fiscal Year of each year during the Term, the Conservancy shall provide the BID Corp with a new annual plan for the Greenway that outlines: (a) the anticipated Work to be performed for the upcoming calendar year, and (b) the plan for the overall operation, programming, and marketing of the Greenway for the upcoming calendar year (the "Annual Programming Plan").

4.2. Annual Budget and Capital Improvements Plan. For each year of the Term, the Conservancy shall provide to the BID Corp, (a) a draft annual budget for the Conservancy's revenue, operations,

and expenditures for the Greenway for the upcoming calendar (the "Annual Budget") and (b) a 5-year capital improvements plan that identifies the Conservancy's plan for ensuring the Greenway and its assets will continue in a good state of repair and maintenance during the upcoming five (5) year period, which plan may be the same plan provided to the State as may be required pursuant to the Greenway Lease (the "Capital Improvements Plan"). The Conservancy will provide the Annual Budget and the Capital Improvements Plan simultaneously with the Conservancy's submission of the Annual Budget to the Conservancy Finance, Audit, and Risk Management Committee. The Annual Budget shall quantify the resources dedicated to operations and maintenance of the Greenway consistent with the Greenway Standards.

4.3. BID Corp Review and Input. After receipt of the proposed Annual Programming Plan, Capital Improvements Plan, or Annual Budget, the BID Corp may review such plans and budget and provide the Conservancy with comments, advice, or input regarding such Plan or Budget, which the Conservancy shall reasonably and in good faith take into account or consider.

4.4. The Conservancy shall promptly notify the BID Corp of any proposed material changes or modifications to any of the Annual Programming Plan, the Capital Improvements Plan, or the Annual Budget, and promptly provide to the BID Corp a written copy of the same, and the provision of Section 4.3 shall apply to any such proposed material changes or modifications.

**5. Performance Monitoring; Books and Records; Quarterly Reporting; Right to Audit.**

**5.1. Performance Monitoring.**

5.1.1. The BID Corp may, from time to time, monitor the Conservancy's performance of the Work and Greenway Enhancements to ensure compliance with the Annual Services Plan, the Capital Improvements Plan, the Annual Budget and/or such other goals or performance standards as may be mutually agreed upon by the parties.

5.1.2. The Conservancy shall provide to the BID Corp upon request any reports, financial or operating results, contracts or the like generated by or entered into by the Conservancy and relating to the Conservancy's expenditure of the Greenway Services Contribution or the Greenway Enhancements Contribution.

5.1.3. The management team for the Conservancy shall meet with the Board of Directors for the BID Corp upon request but at least twice per year to review the operations, maintenance, programming, and overall financial performance of the Greenway to date.

**5.2. Books and Records.**

5.2.1. The Conservancy shall keep accurate records and books relating to the overall operation, maintenance, improvement, repair, programming, and marketing of the Greenway. Such books and records shall include, without limitation, time sheets reflecting hours worked by employees, consultants, contractors and vendors, payroll expenses, other liabilities and payments rendered by the Conservancy, all of which are associated with the Work and the Greenway Enhancements.

5.2.2. The Conservancy shall maintain its books and records at its office located in the City of Boston, or such other location as may be mutually agreed upon in writing by the parties.

5.2.3. The Conservancy shall retain all books and records required by this Agreement for a period of not less than seven (7) years.

### 5.3. Reports.

5.3.1. ***Quarterly Reports.*** For the first three quarters of the Conservancy Fiscal Year, the Conservancy shall furnish to the BID Corp by the end of the month following each such quarter (e.g. April 30, July 31, October 31), the following:

5.3.1.1. A copy of the quarterly report provided to MassDOT pursuant to the Subsidy Agreement; and

5.3.1.2. A quarterly report of the Conservancy's expenditure of the Greenway Services Contribution and the Greenway Enhancements Contribution in substantially similar format to the MassDOT quarterly report.

5.3.2. ***Annual Financials.*** The Conservancy agrees to furnish to the BID Corp within 120 days after the end of each Conservancy Fiscal Year;

5.3.2.1. Complete independently audited financial statements, including Supplemental Audited Statement of Functional Expenses and Expenditures for all expenditures of the Greenway Services Contribution and the Greenway Enhancements Contribution, and Supplemental Audited Statement of Functional Expenses and Expenditures for MassDOT funds;

5.3.2.2. Final quarterly report provided to MassDOT pursuant to the Subsidy Agreement;

5.3.2.3. Final quarterly report of the Conservancy's expenditure of the Greenway Services Contribution and the Greenway Enhancements Contribution in substantially similar format to the MassDOT quarterly report; and

5.3.2.4. The Conservancy's Annual Report.

### 5.4. BID Corp's Right to Audit.

5.4.1. The BID Corp will at all times and upon at least one (1) business day prior notification, which notification may be verbal, have the right to conduct audits and examinations and to make copies of the books and records maintained as required by this Agreement, no matter where such books and records are located. Such right may be exercised through any agent or employee of the BID Corp, or any certified public accountant designated by the BID Corp. Should the BID Corp discover either weaknesses in internal control or errors in record keeping, the Conservancy shall correct such discrepancies promptly upon the BID Corp's request and shall inform the BID Corp in writing of the action taken to correct such audit discrepancies.

5.4.2. Any and all audits conducted by the BID Corp shall be at the BID Corp's expense, except, however, if any audit discloses any material discrepancy with the Annual Budget with respect to costs paid with the Greenway Services Contribution or the Greenway Enhancements Contribution, then the Conservancy shall pay to the BID Corp the reasonable costs of such audit.

## 6. **Termination; Remedies.**

### 6.1. For Cause; Remedies.

6.1.1. If either party fails to fulfill its obligations under this Agreement in a proper and timely manner, or otherwise violates the terms of this Agreement, and such failure is not cured within thirty (30) days after written notice has been given to the defaulting party in accordance with the terms of this Agreement (or if a cure cannot reasonably be completed within such thirty (30) day period, a cure has not been commenced or is not diligently

prosecuted to completion within such thirty (30) day period), then the non-defaulting party shall have the right to terminate this Agreement upon seven (7) days' additional written notice to the defaulting party.

- 6.1.2. The Conservancy, at its sole cost and expense, shall promptly correct any deficiencies or any substandard performance of the Work or Greenway Enhancements that are reported to the Conservancy by the BID Corp. If such deficiencies or substandard performance remain uncured for thirty (30) days after written notice by the BID Corp (if a cure cannot be reasonably completed within such thirty (30) day period, the Conservancy has not commenced or is not diligently prosecuting a remedy within such thirty (30) day period), then the BID Corp shall have the right to perform, or cause the performance of the Work or the Greenway Enhancements, by other means, and any costs thereof shall be deducted from the Greenway Services Contribution or Greenway Enhancements Contribution, as the case may be, for the applicable Fiscal Year.
- 6.1.3. No waiver by either party of any default by the other party in the performance of any provision of this Agreement shall operate as or be construed as a waiver of future default, whether like or different in character.
- 6.1.4. The rights or remedies provided in this Agreement shall not limit the BID Corp, in case of any default by the Conservancy, from asserting any other right or remedy allowed by law, equity, or by statute.

6.2. For Greenway BID Non-Renewal or Dissolution. In the event that the Greenway BID is not renewed, or is dissolved, pursuant to the terms of the Greenway BID Improvement Plan, then the Parties shall cooperate to wind down this Agreement, including the funding of all Greenway Services Contributions and Greenway Enhancements Contribution due and payable as of the date of the Greenway BID's dissolution or discontinuation vote, and this Agreement shall automatically terminate thirty (30) days following such discontinuation vote.

6.3. Unspent Greenway Enhancements Contributions. In the event of a termination of this Agreement pursuant to this Section 6 and to the extent the Conservancy is then holding any unspent Greenway Enhancements Contributions, the Parties shall have ninety (90) days to reasonably and in good faith identify mutually agreeable Greenway Enhancements for which the unspent Greenway Enhancements Contributions shall fund, in which case the Conservancy shall be authorized to perform (or cause to be performed) such mutually agreed upon Greenway Enhancements, and if the Parties fail to mutually agree upon any Greenway Enhancements during such ninety (90) day period, then the BID Corp (or its designee) may cause and approve the expenditure of such unspent Greenway Enhancements Contributions by (i) authorizing the Conservancy to pay to a third-party vendor, as selected by the BID Corp, engaged by the BID Corp or the Conservancy to provide services to the Greenway and/or the BID District that would be consistent with the Scope of Work and/or a Greenway Enhancement, (ii) authorizing the Conservancy to continue carrying out the horticultural services component of the Scope of Work pursuant to the terms of this Agreement, or (iii) providing the Conservancy with a written instrument setting forth the BID Corp's further instructions or authorization for the Conservancy's use or expenditure of such unspent Greenway Enhancements Contributions, which in all cases shall be determined at the sole and absolute discretion of the BID Corp. This Section 6.3 shall survive the termination of this Agreement until all unspent Greenway Enhancements Contributions are expended in accordance with the terms hereof.

## **7. Conservancy Board of Directors.**

7.1. At all times during the Term of this Agreement, at least two (2) Directors serving on the Conservancy's Board of Directors shall be individuals designated or approved by the BID Corp in its sole discretion (the "BID Corp Appointees"). The BID Corp hereby approves Thomas O'Brien and



Kimberly Sherman Stamler to serve as interim BID Corp Appointees, for purposes of this Section 7, until the earlier of (i) such date on which at least two (2) BID Corp Appointees have been appointed to the Conservancy's Board of Directors pursuant to Section 7.2 below, or (ii) December 31, 2018 (such earlier date being the "Board Transition Date"). After the Board Transition Date, the BID Corp Appointees, for purposes of this Section 7, shall be such other individuals designated or approved by the BID Corp in its sole discretion, and as further set forth in Section 7.2.

7.2. The BID Corp may from time to time provide to the Conservancy the names of individuals approved by the BID Corp to serve as the BID Corp Appointees (the "BID Corp Nominees"). The Conservancy shall, in good faith, consult with those individuals and entities charged pursuant to the Conservancy Legislation with appointing Directors to the Conservancy's Board of Directors (the "Other Nominators") to encourage such Other Nominators to nominate a BID Corp Nominee as the Other Nominators' appointee to the Conservancy's Board of Directors. In the event that any BID Corp Nominee is nominated by one of the Other Nominators and appointed to the Conservancy Board of Directors, such individual shall serve as a BID Corp Appointee. In the event that (a) no Other Nominator nominates one or both of the two (2) BID Corp Appointees, or (b) at any time during the Term, a BID Corp Appointee, who was nominated by an Other Nominator, is removed or replaced and such Other Nominator's appointee is an individual who is not a BID Corp Nominee or other individual designated by the BID Corp in its sole discretion, which in either case will result in less than two (2) BID Corp Appointees on the Conservancy's Board of Directors, then the Conservancy shall appoint to the Conservancy Board of Directors, from among the seven (7) Director seats to be filled by the Conservancy Board pursuant to the Conservancy Legislation, individuals included on a list provided by the BID Corp to serve as BID Corp Appointees, so as to ensure there are at least two (2) BID Corp Appointees on the Conservancy's Board of Directors.

7.3. The Conservancy and the BID Corp acknowledge and agree that the BID Corp Appointees shall have all of the duties and responsibilities of the Conservancy's Board of Directors, and shall be subject to all policies adopted by the Board of Directors from time to time.

8. **Dispute Resolution.** The parties agree to use good faith and commercially reasonable efforts to resolve any disputes that may arise under this Agreement. To the extent the parties fail to mutually agree upon a resolution within thirty (30) days after the dispute arises, such dispute shall be resolved by arbitration. Within fifteen (15) business days of a request for dispute resolution by arbitration, each party shall appoint an arbitrator. Such arbitrator shall be an experienced real estate professional having not less than ten (10) years' experience in the commercial real estate industry in the City of Boston, and being not affiliated or having any business relationship with either party (or any of their officers, directors, trustees, employees or agents). The two such arbitrators shall jointly appoint a third arbitrator with similar qualifications. If the two arbitrators are unable, within fifteen (15) business days' to appoint a third arbitrator, they shall petition the Boston Office of the American Arbitration Association (or any successor thereto) to appoint same. The decision of the majority of arbitrators as to the dispute at issue shall be binding. The arbitrators shall use good faith diligent efforts to reach a determination within thirty (30) days of the initial request. The arbitration shall be conducted in accordance with the then applicable rules of the American Arbitration Association (or successor). Each party shall pay the fees of the arbitrator selected by it, and one-half of the fee of the third arbitrator.

9. **Insurance.**

9.1. Throughout the Term, the Conservancy shall maintain, as an operating expense of the Greenway, insurance of the types and with the limits required by the Conservancy Lease, which as of the Effective Date are as follows:

- 9.1.1. Workers' Compensation insurance with statutory limits required by the Commonwealth of Massachusetts.
  - 9.1.2. Employer's Liability insurance with a minimum limit of \$500,000 per occurrence.
  - 9.1.3. Commercial General Liability insurance, including, without limitation, premises and operations coverage, products and completed operations coverage, advertising and personal injury coverage, independent contractors liability coverage, contractual liability coverage, and terrorism coverage, with limits per occurrence for bodily injury and property damage of at least \$5,000,000, with an annual aggregate of not less than \$5,000,000. Said limits shall apply to this Agreement notwithstanding any other contracts or agreements to which the Conservancy may be a party. The BID Corp and its members, directors, officers, and employees shall be named as additional insureds.
  - 9.1.4. Commercial Property insurance covering all structures, fixtures, and equipment of the Greenway against all risks of physical damage or loss (including, but not limited to, loss due to fire, explosion, vandalism and malicious mischief, strike, riots and civil commotion, and water damage) on a replacement value basis. The BID Corp and its members, directors, officers, and employees shall be named as additional insureds.
  - 9.1.5. Commercial Automobile Liability insurance covering all owned, non-owned and hired automobiles with a combined single limit of not less than \$2,000,000 for bodily injury and property damage liability, naming the BID Corp and its members, directors, officers, and employees as additional insureds.
- 9.2. The Conservancy shall also maintain, as an operating expense of the Greenway, Comprehensive crime (including Employee Dishonesty) insurance in the amount of \$1,000,000.
- 9.3. Insurance to be secured by the Conservancy as required by this Agreement shall be issued by insurance companies licensed to do business in Massachusetts having an A.M. Best's rating of not less than A-(minus), and otherwise acceptable to the BID Corp in its sole and absolute discretion. The coverage provided shall be primary insurance as to all claims hereunder and shall provide that the insurance carried by the BID Corp is excess and non-contributing with any insurance requirement of the Conservancy. All insurance policies required in Sections 9.1.2 through 9.1.5 and (inclusive) Section 9.2 above shall be endorsed to waive the insurer's right of subrogation against the BID Corp and its members, directors, officers, and employees. The Conservancy's insurance shall be in force as of the Effective Date and shall remain continuously in force for the duration of the Term.
- 9.4. The Conservancy shall provide to the BID Corp upon request copies of certificates of insurance evidencing of required insurance coverages on or before the Effective Date and when coverage is renewed or replaced. The Conservancy shall provide the BID Corp at least thirty (30) days' advance written notice for any policy or coverage that will be canceled, not renewed, or materially changed.
- 9.5. The BID Corp's acceptance of the insurance required of the Conservancy shall not relieve, limit, or decrease the liability of the Conservancy. All policy deductibles or retention shall be the sole responsibility of the Conservancy. The BID Corp does not represent that the insurance requirements above are sufficient to protect the Conservancy's interest or provide adequate coverage.
- 9.6. The Conservancy waives any rights of recovery against the BID Corp (1) because of a lack of insurance coverage, and (2) for loss or damage to any of its equipment, machinery, tools, or property that is used in connection with this Agreement.
- 10. Indemnification.** The Conservancy shall defend, indemnify, and hold harmless the BID Corp and its members, directors, officers, and employees, from any liabilities, claims, damages, costs, judgments,

and expenses, including reasonable attorneys' fees, incurred by the BID Corp and resulting from (1) the negligent act or omission of the Conservancy or its employees, agents, contractors, subcontractors, vendors, and the employees of such contractors, subcontractors, and vendors, in the performance of the Work or the Greenway Enhancements pursuant to this Agreement; (2) the Conservancy's failure to comply with any applicable law, ordinance, regulation, executive order or rule; (3) the use, misuse, or failure of any equipment, machinery, tools, or property by the Conservancy or its employees, agents, contractors, subcontractors, vendors, and the employees of such contractors, subcontractors, and vendors used in the performance of the Work or the Greenway Enhancements pursuant to this Agreement (regardless of ownership of such equipment, machinery, tools, or property); or (4) the failure of the Conservancy to fully perform, in any respect, any of its obligations under this Agreement; provided, however, the Conservancy shall not be obligated to indemnify the BID Corp and its members, directors, officers, and employees for their own gross negligence or willful misconduct.

11. **Notices.** Each party providing notice pursuant to this Agreement shall use one of the following delivery methods, with the effectiveness for such method noted: (i) personal delivery, which shall be effective upon delivery; (ii) registered or certified mail, in each case, return receipt requested, which shall be effective upon delivery as indicated by the date on the signed receipt; or (iii) nationally recognized overnight courier, with all fees prepaid, which shall be effective upon delivery. Any such notice shall be addressed as shown below, except that any party may, by proper notice to the other, designate an alternative address for purposes of notice.

If to the Conservancy:                      Rose Fitzgerald Kennedy Greenway Conservancy, Inc.  
185 Kneeland Street  
Boston, MA 02111

With a copy to:                              Goulston & Storrs PC  
400 Atlantic Avenue  
Boston, MA 02144  
Attention: Peter N. Kochansky, Esq.

If to the BID Corp:                           Greenway BID Corp  
33 Broad Street, Suite 300  
Boston, MA 02109  
Attention Tom Ryan

12. **Transfer of Interest.** Neither the Conservancy nor the BID Corp shall assign, transfer, convey, or otherwise dispose of any interest in this Agreement in any manner, without the prior written approval of the other Party.
13. **Compliance with Laws.** The Conservancy shall comply with all applicable federal, state, and local laws, ordinances, regulations, executive orders and rules that are now, or may in the future become, applicable to the Conservancy or the services to be performed by the Conservancy under this Agreement. The Conservancy shall be responsible for (1) obtaining all licenses, permits, and bonds required by any governmental agency having jurisdiction or authority over the Greenway or the services to be performed by the Conservancy under this Agreement and (2) paying all sales, consumer, use, income, employment, and other taxes. If the Conservancy shall discover any provisions of this Agreement or any direction provided by the BID Corp as contemplated herein which are contrary to or inconsistent with any such laws, ordinances, regulations, executive orders or rules, the Conservancy shall immediately report such inconsistency to the BID Corp in writing.

#### **14. Independent Contractor; No Joint Venture.**

14.1. Nothing contained in this Agreement is intended to, or shall be construed in any manner, as creating or establishing (1) an employer/employee relationship between the parties, or (2) a partnership, joint venture, agency or any other similar mutual relationship between the parties. The Conservancy shall at all times remain an independent contractor with respect to the services to be performed by the Conservancy under this Agreement. The Conservancy shall have no power or authority to bind the BID Corp.

14.2. Any and all employees of the Conservancy or other personnel engaged in the performance of the services to be performed by the Conservancy under this Agreement shall be considered employees or subcontractors of the Conservancy only and not of the BID Corp; and the Conservancy shall be solely responsible for their conduct.

14.3. The Conservancy shall negotiate with any union lawfully entitled to represent any employees of the Conservancy or other personnel engaged in the performance of the services to be performed by the Conservancy under this Agreement and shall execute in its own name, and not as agent for the BID Corp, any collective bargaining agreements or labor contracts covering such employees or personnel.

14.4. The Conservancy shall be solely liable for and shall pay all employer contributions and taxes imposed by the federal government and the Commonwealth of Massachusetts, and any and all claims that might arise, including claims under the Workers' Compensation Act of the Commonwealth of Massachusetts or any other state, on behalf of said employees or other persons while so engaged in the performance of the services to be performed by the Conservancy under this Agreement, shall be the sole obligation and responsibility of the Conservancy.

14.5. The Conservancy represents that it is and will continue to be an equal opportunity employer and agrees to advertise as such.

#### **15. Limitation on Liability.**

15.1. In no event shall the individual officers, directors, trustees, partners, shareholders, managing agents, employees, volunteers, or agents of BID Corp, or of any subsidiary wholly owned by the BID Corp, be personally liable hereunder.

15.2. In no event shall the individual officers, directors, trustees, partners, shareholders, managing agents, employees, volunteers, or agents of the Conservancy, or of any subsidiary wholly owned by the Conservancy, be personally liable hereunder.

#### **16. Miscellaneous.**

16.1. Headings. The paragraph headings throughout this Agreement are for convenience and reference only, and the words contained herein shall in no way be held to explain, modify, amplify, or aid in interpretation, construction, or meaning of the provisions of this Agreement.

16.2. Governing Law. The laws of the Commonwealth of Massachusetts shall govern all interpretations of this Agreement, without giving effect to its conflicts of law principles and the appropriate venue and jurisdiction for any litigation which may arise hereunder will be in those courts located within Suffolk County, Massachusetts.

16.3. Partial Invalidity. If any provision of this Agreement or application thereof to any person or circumstance shall to any extent be invalid or unenforceable by a final decision of any court of competent jurisdiction, the remainder of this Agreement or the application of such provision to persons or circumstances other than those as to which is held invalid or unenforceable shall not be

affected thereby and each provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

16.4. Amendment. No subsequent amendment to this Agreement shall be binding upon any party unless reduced to writing and signed by the parties.

16.5. No Waiver. The failure of either party to insist upon the strict performance of any provision of this Agreement shall not be construed as a waiver for the future of such provision. Any waiver shall be effective only if in writing and signed by a party's authorized representative.

16.6. Entire Agreement. This Agreement constitutes the entire agreement regarding the subject matters set forth herein by the parties (or their affiliates) and supersedes all prior agreements, including without limitation that certain Greenway MOU, any side letters and understandings, whether written or oral, relating to the subject matter of this Agreement.

16.7. Counterpart Signatures; Authority. This Agreement may be executed and delivered in one or more counterparts, including by facsimile signature, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Each person signed this Agreement on behalf of a signatory party represents and warrants that such person has been duly authorized and directed to execute and deliver this Agreement and that all corporate or other entity authorization has been secured in the manner provided by the governance documents of such signatory party and by applicable law.

*[Signature Page Follows]*

IN WITNESS WHEREOF, the parties have executed this Agreement under seal as of the day and year first written above.

**Rose Fitzgerald Kennedy Greenway Conservancy,  
Inc.**

By: [Signature]  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Greenway Business Improvement District  
Corporation**

By: [Signature]  
Name: Stephen N. Faler  
Title: Chairman

*[Signature Page to Services Agreement]*