

CITY OF BOSTON – SECOND GREENWAY FUNDING AGREEMENT

This Second Greenway Funding Agreement (this “Agreement”) dated as of __ day _____, 2023, effective July 1, 2023 (the “Effective Date”), implements the commitment of the CITY OF BOSTON, a municipal corporation with offices located at One City Hall Square, Boston, MA 02210 (the “City”) to make payments to the ROSE FITZGERALD KENNEDY GREENWAY CONSERVANCY, INC., a private, charitable, non-profit corporation with a principle place of business located at 185 Kneeland Street, Boston, MA 02111 (the “Conservancy”) under the terms of that certain 2022 Greenway BID MOU (defined below). The City and the Conservancy are collectively referred to herein as the “Parties”.

BACKGROUND

- A. Pursuant to that certain Memorandum of Understanding by and among the Massachusetts Department of Transportation (the “State”), the City, the Conservancy, and A Better City, acting on behalf of its Greenway Abutters Committee, dated June 19, 2017 (the “2017 Greenway BID MOU”), the parties thereto set forth a framework for certain funding contributions to the Conservancy by the State, the City, and the to-be-created Greenway Business Improvement District Corporation (the “BID Corp”) in accordance with M.G.L. c. 40O (the “BID Statute”) for the continued operation, management, improvement and maintenance of the Rose Fitzgerald Kennedy Greenway (the “Greenway”) by the Conservancy.
- 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, as amended (the “Greenway Lease”).
- C. On October 17, 2018 the City of Boston City Council established a \$5,000,000.00 fund (the “Trust Fund”), held and managed by the Collector-Treasurer of the City of Boston, income from which (“Income”) is dedicated to supporting maintenance, operation, management and improvement of the Greenway for a period of at least ten years. Under the terms of the Trust Fund, the sole Trustee is the Collector-Treasurer for the City of Boston, who has delegated administration of the Trust Fund to the 1st Assistant Collector-Treasurer and the 2nd Assistant Collector-Treasurer.
- D. In furtherance of the 2017 Greenway BID MOU and in furtherance of the purposes for which the Trust Fund was created, the City and the Conservancy entered into that certain City of Boston – Greenway Funding Agreement dated January 30, 2019 (the “2019 City Greenway Funding Agreement”) regarding how the City would administer the Trust Fund and facilitate the efficient use of public funds to be contributed to the Greenway for maintenance, operation, management and improvement of the Greenway and for the promotion of the public interests in contributing to the City’s economic vitality along the Greenway. The 2019 City Greenway Funding Agreement expires June 30, 2023.

- E. The State, the City of Boston, the Conservancy and the Bid Corp executed an updated Memorandum of Understanding on December 15, 2022 (the “2022 Greenway BID MOU”), for the continued maintenance, operation, management and improvement of the Greenway by the Conservancy.
- F. The State and the Conservancy executed that certain Commonwealth of Massachusetts Subsidy Agreement dated effective July 1, 2023 to formally set forth the State’s agreement to make certain cash contributions, non-cash operating support, and capital funds contributions to the Conservancy in furtherance of the 2022 Greenway BID MOU (the “2023 MassDOT Subsidy Agreement”).
- G. In furtherance of the 2022 Greenway BID MOU, the BID Corp has agreed to make certain cash contributions to the Conservancy, as set forth in that certain Second Funding and Services Agreement effective July 1, 2023 “2023 BID Corp Agreement”.
- H. Accordingly, the Parties now desire to enter into this City of Boston – Second Funding Agreement on the terms described herein. For the avoidance of doubt, as of the Effective Date, this Agreement shall supersede and replace the 2019 City Greenway Funding Agreement in its entirety.

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, 2028 (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) City Payments.

The City will calculate the Income from the Trust Fund, and make annual cash grant payments of such Income to the Conservancy, as described in this section.

a) Definitions.

“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.

“Calendar Year” shall mean the period commencing on January 1 of a given calendar year and ending on December 31 of the same calendar year.

b) Calculation and Distribution of Income.

- i) For Fiscal Year 2024, the Income earned by the Trust Fund shall be deemed to be 5.00% of the Trust Fund balance as of December 31, 2022.

The Collector-Treasurer will perform this calculation and inform the Conservancy of the Fiscal Year 2024 Income amount on or before June 15, 2023. The City will disburse the Fiscal Year 2024 Income to the Conservancy in four (4) equal payments of 25% of the Fiscal Year 2024 Income amount on the following dates: July 1, 2023; October 1, 2023; January 1, 2024; and April 1, 2024.

- ii) For Fiscal Years 2025, 2026, 2027 and 2028 the Income earned by the Trust Fund shall be deemed to be 5.00% of the Trust Fund balance as of December 31 of the Calendar Year immediately preceding the Fiscal Year and will be distributed on July 1, October 1, January 1, and April 1 of each fiscal year. Such balances will be decreased by the amount of Income distributed and will be decreased or increased based on principal gain or loss, dependent on market fluctuations. In order to facilitate the Conservancy's budgeting process, the City shall inform the Conservancy of the Trust Fund balance on or about November 1 of each year.
- c) Administrative Fees. As with similar Trusts managed by the City, an administrative charge of up to 0.75% of the balance of the Trust Fund will be assessed annually to support operational costs of the Trust Fund's administration. This administrative charge will be assessed in addition to the Income distributed from the Trust Fund in any year and therefore will not reduce the Income distributed to the Conservancy below 5.00%. The administrative charge is a maximum amount, but the City's administrative charge may be less than 0.75% in any year. Any funds assessed as an administrative charge and not expended will be held as Income for future distribution or reinvested as principal.
- d) Requirement for Contributions. Notwithstanding anything herein to the contrary, the City's payment of the Income is conditioned upon (A) the BID Corp's funding of its respective funding contributions to the Conservancy as reflected in the "Funding Schedule" of the 2022 Greenway BID MOU, and (B) 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(a) below). In the event of failure of any of the foregoing conditions, the City may, at its sole discretion: (1) with respect to a failure of condition (A) above, deduct an amount equal to the amount of the unpaid BID Corp contribution from any future quarterly contribution otherwise due from the City under this Agreement, and (2) with respect to a failure of condition (B) 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 5 below.

3) Conservancy Maintenance and Management.

The City's grant of Income to the Conservancy shall be used to fund the Conservancy's work to operate, manage, maintain, and improve the Greenway. The Conservancy shall carry out such work 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**.

The Conservancy shall provide, supervise, manage, and administer all services and work contemplated by this Agreement (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 in a diligent, efficient, and first-class manner consistent with its obligations to operate the Greenway under the Lease. 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 City to review and/or inspect such Work.

4) Financials.

Books and Records. The Conservancy shall keep accurate records and books relating to the overall operation, maintenance, improvement, repair, programming, and marketing of the Greenway. 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. The Conservancy shall retain all books and records required by this Agreement for a period of not less than seven (7) years.

Reports.

Quarterly Reports. For the first three (3) quarters of the Conservancy Fiscal Year, the Conservancy shall furnish to the City by the end of the month following each such quarter (e.g. April 30, July 31, October 31), the following:

- A. A copy of the quarterly report provided to MassDOT pursuant to the 2023 MassDOT Subsidy Agreement; and
- B. A quarterly report of the Conservancy's expenditure of the City's Greenway Contribution in substantially similar format to the MassDOT quarterly report.

Annual Financials. The Conservancy agrees to furnish to the City no later than March 31 of the year following each Conservancy Fiscal Year:

- A. Final quarterly report provided to MassDOT pursuant to the 2023 MassDOT Subsidy Agreement;
- B. Final quarterly report provided to the BID Corp pursuant to the 2023 BID Corp Agreement;
- C. Final quarterly report of the Conservancy's expenditure of the City's Greenway Contribution in substantially similar format to the MassDOT quarterly report; and

D. The Conservancy's Annual Report.

City's Right to Audit. The City will at all times and upon at least two (2) business days 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 City, or any certified public accountant designated by the City. Should the City discover either material weaknesses in internal control or errors in record keeping, the Conservancy shall correct such discrepancies promptly upon the City's request and shall inform the City in writing of the action taken to correct such audit discrepancies. Any and all audits conducted by the City shall be at the City's expense.

5) Termination; Remedies.

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) Dispute Resolution.

The parties agree to use good faith and commercially reasonable efforts to resolve any disputes that may arise under this Agreement prior to initiating any formal proceedings.

7) Insurance.

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:

Workers' Compensation insurance with statutory limits required by the Commonwealth of Massachusetts.

Employer's Liability insurance with a minimum limit of \$500,000 per occurrence.

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 City and its members, directors, officers, and employees shall be named as additional insureds.

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 City and its members, directors, officers, and employees shall be named as additional insureds.

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 City and its members, directors, officers, and employees as additional insureds.

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.

The Conservancy shall provide to the City 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's insurance shall be in force as of the Effective Date and shall remain continuously in force for the duration of the Term. The Conservancy shall provide the City at least thirty (30) days' advance written notice for any policy or coverage that will be canceled, not renewed, or materially changed.

8) 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 City: 1st Assistant Collector-Treasurer
City of Boston Treasury Department
City Hall, Room M-5
Boston, MA 02201

With a copy to:

Corporation Counsel
City of Boston Law Department
City Hall, Room 615
Boston, MA 02201

9) 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 City 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 City in writing.

10) Limitation on Liability.

Performance under this Agreement by the Parties, their agents, servants, and employees, shall be for public and governmental purposes, and all privileges and immunities from liability enjoyed by governmental units, their agents servants and employees, shall extend to performance under this Agreement to the extent permitted by Massachusetts and Federal law; provided that, notwithstanding any provisions of law or charter to the contrary, neither party to this Agreement shall be exempt from liability for its obligations under this Agreement.

Unless otherwise exempt by law, the Conservancy shall indemnify and hold harmless the City of Boston and its Departments, agents, officers, and employees against any and all claims, liabilities, and costs for personal injury or property damages, patent or copyright infringement, or other damages that the City may sustain which arise out of or in connection with the Conservancy's performance of this Agreement, including but not limited to the negligent, reckless or intentional conduct of the Conservancy, its agents, officers, employees or subcontractors, except to the extent such liability arises from the negligence or intentional misconduct of the City outside the scope of this Agreement. After prompt notification of a claim by the City, the Conservancy shall have an opportunity to participate in the defense of such claim and any negotiated settlement agreement or judgment. The City shall not be liable for any costs incurred by the Conservancy arising under this paragraph. Any indemnification of the Conservancy shall be subject to appropriation and applicable law.

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. To the extent liability arises from the negligent, reckless or intentional conduct of such individuals or wholly owned subsidiaries, the Conservancy shall indemnify and hold harmless the City of Boston and its Departments, agents, officers, and employees against and all such claims, liabilities, and costs. In no event shall the employees, volunteers, representatives or agents of the City be personally liable hereunder.

11) Independent Contractor; No Joint Venture.

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 have no power or authority to bind the City.

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 City; and the Conservancy shall be solely responsible for their conduct.

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.

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

12) Miscellaneous.

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.

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.

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 the 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.

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

Transfer of Interest. Neither the Conservancy nor the City 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.

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.

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 2022 Greenway BID MOU, any side letters and understandings, whether written or oral, relating to the subject matter of this Agreement.

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]


EXECUTION VERSION

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: 
Name: Chris Cook
Title: Executive Director

The City of Boston

By: 
Name: Maureen Garceau
Title: 1st Assistant Collector-Treasurer

Approved as to form:

FAT



Adam N. Cederbaum
Corporation Counsel, City of Boston

Exhibit A

Greenway Standards

[see attached]