



Staff Summary Report

Council Meeting Date: 09-18-08

Agenda Item Number: _____

SUBJECT: Approval to enter into a landscape agreement between the City of Tempe and Tempe Transit, L.L.C. for installation and maintenance of landscaping at the Valley Metro Rail, Inc. Traction Power Substation 12 located adjacent to the Tempe Transit, L.L.C. Equinox project at the Southeast corner of Apache Boulevard and McClintock Drive.

DOCUMENT NAME: 20080918pwjism01 **TRANSPORTATION PLANNING (1101-01)**

SUPPORTING DOCS: Yes

COMMENTS: This Agreement defines the installation and maintenance of landscaping at the Valley Metro Rail, Inc. Traction Power Substation 12 located adjacent to the Tempe Transit, L.L.C. Equinox project.

PREPARED BY: Jyme Sue McLaren, Deputy Public Works Manager – LRT Division (350-8803)

REVIEWED BY: Glenn Kephart, Public Works Manager (350-8205)

LEGAL REVIEW BY: Cynthia McCoy, Assistant City Attorney (858-2187)

FISCAL NOTE: Developer will assume all costs associated with installation and maintenance.

RECOMMENDATION: Staff recommends approval of the Landscape and Maintenance Agreement

ADDITIONAL INFO: This agreement will provide a consistent landscape palette across the Tempe Transit, L.L.C. property and the adjacent Valley Metro Rail, Inc. traction power substation.

When recorded, return to:

Brian Jordan, Esq.
Kutak Rock LLP
8601 N. Scottsdale Road
Suite 300
Scottsdale, AZ 85253

LANDSCAPE MAINTENANCE AGREEMENT

THIS LANDSCAPE MAINTENANCE AGREEMENT (“Agreement”) is entered into and delivered effective as of September ___, 2008 (“**Effective Date**”) by and between Tempe Transit L.L.C., an Arizona limited liability company (“**Tempe Transit**”) and the City of Tempe, an Arizona municipal corporation (“**COT**”). Tempe Transit and COT are each a “**Party**” and collectively the “**Parties**”.

BACKGROUND

A. Tempe Transit owns the real property described on **Exhibit “A”** (“**Tempe Transit Parcel**”).

B. COT owns and occupies the real property, otherwise known as the Traction Power Substation Parcel, that is adjacent to the Tempe Transit Parcel (“**COT Parcel**”). The COT Parcel is legally described on **Exhibit “B”**.

C. Tempe Transit intends to develop on the Tempe Transit Parcel a mixed-use development that consists of a six-story above-grade parking structure which contains a 300-space Valley Metro Light Rail park and ride facility, commercial/retail on the surface level, along with 408 multi-family residential units. In connection with its intended development, Tempe Transit will install and maintain certain landscaping, lighting, and irrigation features (collectively, the “**Landscape Features**”) on the Tempe Transit Parcel and a portion of the COT Parcel (the “**Landscape Area**”). Tempe Transit has submitted to the City’s Development Services Department, and received approval of, a landscape plan depicting the Landscape Area and Features (the “**Landscape Plan**”).

D. Tempe Transit and COT desire to enter into this Agreement to provide that Tempe Transit, subject to the terms and conditions of this Agreement, shall be responsible for the ongoing maintenance and repair of the Landscape Features.

AGREEMENT

For valuable consideration, the Parties agree to the following terms and conditions:

1. **Recitals.** The Parties acknowledge and confirm the accuracy of the Recitals, which are incorporated into and made a part of this Agreement.

2. **Maintenance and Repair.** Tempe Transit shall, at its sole cost and expense, install the Landscape Features within the Landscape Area, and repair and maintain the Landscape Features. If the Landscape Features do not conform to the Landscape Plan, or are constructed outside the Landscape Area (provided that such construction has not been approved under the Landscape Plan), then COT shall have the absolute right to require their removal and relocation by providing written notice to Tempe Transit specifying in reasonable detail the extent of the non-conforming Landscape Features. If Tempe Transit does not cure the non-conforming Landscape Features within 30 days from receipt of written notice from COT, then Tempe Transit shall be in default of this Agreement. Tempe Transit shall not create or permit to be created or allow to exist any mortgage, encumbrance or other lien upon the COT Parcel; provided that if any mechanics' or materialmans' liens relating to the construction of the Landscape Features are filed against the Landscape Area or COT Parcel, then within a reasonable time after written request, Tempe Transit shall bond over such liens or provide COT with lien waivers or other evidence of payment for any work performed on the Landscape Area or the COT Parcel by or at the request of Tempe Transit. In performance of the maintenance and repair to the Landscape Features, Tempe Transit will be permitted reasonable access to the Landscape Area. The City agrees that no encroachment permit is required for construction and maintenance of the Landscape Features.

3. **Conditions.** Tempe Transit and any of its contractors, agents, or employees performing the landscape installation and maintenance activities pursuant to this Agreement (each such party is referred to in this Agreement as the "**Responsible Party**") shall comply with the following conditions and restrictions in the performance of this Agreement:

(a) The Responsible Party shall be licensed in the State of Arizona and shall have insurance coverage on all of its staff and vehicles entering the COT Property in amounts of at least \$2,000,000 in the aggregate.

(b) The Responsible Party will keep the Landscape Area in good condition and repair at all times and free from weeds, trash, dead plants and unsightly materials and will keep all landscaping neatly trimmed, properly cultivated and satisfactorily irrigated. The Responsible Party shall comply with all applicable ordinances, regulations and laws pertaining to the installation and maintenance of the Landscape Features.

(c) The Responsible Party shall not block or use any designated parking spaces located on the COT Parcel for purposes of storing its vehicles or equipment while conducting maintenance activities on the Landscape Area.

4. **Remedies.** In the event of a breach of any of the terms or conditions of this Agreement, those affected shall be entitled to full and adequate relief by all available legal and equitable remedies, including, without limitation, specific performance.

5. **Run with the Land.** This Agreement shall run with the land and shall burden and bind all persons acquiring title to or any interest in or to the Tempe Transit Parcel or the COT Parcel.

6. **Indemnity.** Tempe Transit will indemnify, defend and hold harmless COT, on COT's written demand, for, from, and against any cost, loss, damage, or expense (including, but not limited to, attorneys' fees in a reasonable amount and all court costs and other litigation expenses, whether or not taxable under local law) resulting from a breach of this Agreement or willful misconduct or gross negligence on the part of Tempe Transit or its officers, employees, agents, or representatives. COT will indemnify, defend and hold harmless Tempe Transit, on Tempe Transit's written demand, for, from, and against any cost, loss, damage, or expense (including, but not limited to, attorneys' fees in a reasonable amount and all court costs and other litigation expenses, whether or not taxable under local law) resulting from a breach of this Agreement or willful misconduct or gross negligence on the part of COT or its officers, employees, agents, or representatives.

7. **Governing Law.** This Agreement will be construed in accordance with the laws of the State of Arizona. Any action brought to interpret, enforce, or construe any provision of this Agreement must be commenced and maintained in the Superior Court of the State of Arizona, County of Maricopa or, if the Superior Courts lacks or declines jurisdiction, in the United States District Court for the District of Arizona. If any action is brought to enforce or to interpret any provisions or rights under this Agreement, the unsuccessful party in the action, as determined by the court, will pay the successful party, as determined by the court, all costs, legal fees, and expenses through trial and appeal.

8. **Notices.** All notices or other communications required or permitted to be provided pursuant to this Agreement shall be in writing and shall be hand delivered, sent by United States Postal Service, postage prepaid, by a nationally recognized courier service. All notices shall be deemed to have been given when delivered if hand delivered, when received if sent by courier, or forty-eight (48) hours following deposit in the United States Postal Service. Notices shall be addressed as follows:

If to Tempe Transit: c/o Gray Development Group
2555 East Camelback Road
Suite 1050
Phoenix, AZ 85016
Attention: Daniel W. Tilton
Facsimile: (602) 954-9308

with copy to: Kutak Rock LLP
8601 North Scottsdale Road, Suite 300
Scottsdale, AZ 85253
Attention: Brian Jordan
Fax: 480-429-5001

To COT: City Manager
City of Tempe
P. O. Box 5002
31 East 5th Street
Tempe, Arizona 85281

With a copy to:

City Attorney
Tempe City Attorney's Office
P. O. Box 5002
21 E. Sixth Street, Suite 201
Tempe, Arizona 85281

9. **No Third-Party Beneficiaries.** Nothing contained in this Agreement will be deemed to grant or to confirm on any person, except COT and Tempe Transit, the right to assert or exercise a separate or independent right to enforce this Agreement or to enjoy any benefits or privileges under this Agreement. This Agreement is not intended to be a public dedication or a gift of any public or private person or entity.

10. **Entire Agreement.** This Agreement, together with its Exhibits, is the entire agreement of the Parties and supersedes any and all prior oral or written agreements or understandings between the Parties pertaining to the subject matter of this Agreement. The Parties have made no representations, warranties, or inducements, express or implied, other than as set forth in this Agreement.

11. **Invalidity.** Every term of this Agreement shall be enforceable to the fullest extent permitted by law. If any term of this Agreement is determined to be to any extent unenforceable, that provision will be deemed modified in the most minimal manner so as to make it enforceable, and the remainder of this Agreement shall not be affected.

12. **Time of the Essence.** Time is of the essence of all provisions of this Agreement in which time is a relevant factor.

13. **General Provisions.** Each person executing this Agreement personally represents that he or she has the full legal right to do so in the capacity indicated. No waiver of any term of this Agreement shall be deemed to be a continuing waiver of that term or a waiver of any other term of this Agreement. This Agreement may be signed in one or more counterparts, whether by original, copy, or telecopy signature, each of which together will form one binding agreement of the Parties. Under no circumstances shall the parties hereto be considered partners or joint ventures'.

Dated and executed as of the Effective Date.

“Tempe Transit”

Tempe Transit L.L.C., an Arizona limited liability company

By: GDG Enterprises L.L.C., an Arizona limited liability company, its Manager

By: 
Name: Daniel W. Tilton
Title: Senior Vice President

“COT”

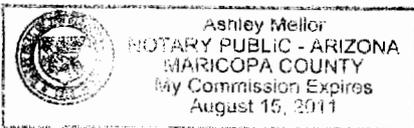
City of Tempe, an Arizona municipal corporation

By _____
Name _____
Title _____

State of Arizona)
) ss.
County of Maricopa)

On this the 25th day of August, 2008, before me, the undersigned Notary Public, personally appeared Daniel W. Tilton, the Senior Vice President of GDG Enterprises L.L.C., an Arizona limited liability company, the Manager of Tempe Transit L.L.C., an Arizona limited liability company and acknowledged that he executed the within and foregoing instrument for and on behalf of said limited liability company, being authorized so to do, for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.



Ashley Mellor
Notary Public

My commission expires:

AUGUST 15, 2011

State of Arizona)
) ss.
County of Maricopa)

On this the _____ day of _____, 2008, before me, the undersigned Notary Public, personally appeared _____, the _____ of the City of Tempe, an Arizona municipal corporation, and acknowledged that he executed the within and foregoing instrument for and on behalf of said limited liability company, being authorized so to do, for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

My commission expires:

EXHIBIT "A"
LANDSCAPE MAINTENANCE AGREEMENT

[Legal Description of the Tempe Transit Parcel]

Lot 1, McClintock and Apache Park and Ride, according to Book 933 of Maps,
page 46, records of Maricopa County, Arizona

EXHIBIT "B"
LANDSCAPE MAINTENANCE AGREEMENT

[Legal Description of COT Parcel]

Lot 2, McClintock and Apache Park and Ride, according to Book 933 of Maps,
page 46, records of Maricopa County, Arizona