

INTERGOVERNMENTAL AGREEMENT

THIS AGREEMENT is made and entered into this ____ day of _____, 201[] (“Effective Date”) by and between the **CITY AND COUNTY OF DENVER**, a home rule city and municipal corporation of the State of Colorado, hereinafter referred to as the “City,” and the **CHERRY CREEK NORTH BUSINESS IMPROVEMENT DISTRICT**, a quasi-municipal corporation and political subdivision of the State of Colorado, created pursuant to Part 12, Article 25 of Title 31 of the Colorado Revised Statutes and by enabling ordinance of the City, with an address of 299 Milwaukee Street, Suite 201, Denver, CO 80206, hereinafter referred to as the “District.” The District and the City may be referred to collectively herein as the “Parties” or the “parties.”

WITNESSETH:

WHEREAS, the District was created by City Ordinance No. 741, Series 1988, in order to provide enhanced or otherwise unavailable services, facilities and improvements;

WHEREAS, the District was authorized to issue up to a maximum of \$18,500,000 in general obligation bonds by its electors at a District election held on November 7, 2006; and

WHEREAS, in October 2008 the District issued \$9,250,000 of its General Obligation Bonds Series 2008, and in September 2009 the District issued \$9,250,000 of its General Obligation Bonds Series 2009 to finance the costs of designing, constructing, renovating, beautifying and otherwise providing public infrastructure throughout the District (the “Project”);

WHEREAS, the Project consists of lighting, signage and wayfinding, intersection enhancements, streetscaping and other public improvements throughout the District’s sixteen blocks;

WHEREAS, the Project also includes public improvements to Fillmore Street between 1st Avenue and 2nd Avenue (“Fillmore Plaza”), which is currently an approximately 28,000 square-foot outdoor plaza area, a portion of which is located in the City’s dedicated public right of way but currently closed to vehicular traffic, and is utilized for occasional events, as permitted by the City;

WHEREAS, the initial Project design for Fillmore Plaza has evolved and been redesigned to accommodate the needs and interests of the District, business owners within the District, the City and the neighboring community;

WHEREAS, the District and the City have engaged the community, including the registered neighborhood organizations (Cherry Creek North Neighborhood Association, Country Club Historic Neighborhood, Cherry Creek East Association, and Capitol Hill United Neighborhoods (collectively, the “RNOs”) in the redesign process for Fillmore Plaza;

WHEREAS, the District, the City and the RNOs have agreed upon a hybrid redesign concept for Fillmore Plaza (the “Fillmore Plaza Redesign”) and its operations that would allow for limited vehicular traffic on Fillmore Street, prohibit parking in the middle and on the north end of Fillmore Street and establish an Event Advisory Group (EAG) with community representation to provide advice to the District regarding BID events;

WHEREAS, the City will retain ownership of the public right of way in Fillmore Plaza in its current status as dedicated right of way;

WHEREAS, the City and the District intend for the District to construct, maintain, repair and be responsible for all liability related to surface and above-surface matters relating to the Fillmore Plaza Redesign improvements located in the City-owned right of way between 1st Avenue and 2nd Avenue on Fillmore;

WHEREAS, the City and the District intend for the District to have the ability to obtain a permit to close Fillmore Plaza for certain events, and to manage the use of Fillmore Plaza for such events;

WHEREAS, the parties acknowledge that the Fillmore Plaza Redesign is subject to review and approval by all applicable City Departments and agencies, including but not limited to Public Works, the Fire Department and Developmental Services;

WHEREAS, the District desires to begin construction of the Fillmore Plaza improvements at its sole expense in January, 2011, in order that said improvements can be completed by the 2011 Cherry Creek Arts Festival;

WHEREAS, the District is ready, willing and able to undertake certain acts contemplated hereunder as a quasi-municipal corporation and political subdivision of the State of Colorado, and not as an agent of the City.

NOW, THEREFORE, in consideration of the premises, the mutual agreements herein contained, and subject to the terms and conditions hereinafter stated, it is hereby understood and agreed by the parties hereto as follows:

1. FILLMORE PLAZA REDESIGN, PARKING AND OPERATIONS:

a. It is the understanding of the Parties that the final design of Fillmore Plaza will generally conform to the September 8, 2010, design features and plan presented to the Council District 10 member and the RNOs, subject to the review and approval of the City. Further, the District hereby agrees and acknowledges:

i. That the middle and northern end of Fillmore Plaza will not have on-street parking availability and that the southern end of Fillmore Plaza will have on-street parking availability, not to exceed ten public parking spaces, as may be required to be modified by the City.

ii. That the on-street parking available on Fillmore Plaza will be metered parking using the same type of parking meters that are currently in use throughout the District, charged at the same rates as existing on-street parking in the District and with the same time limitations associated with existing on-street parking in the District.

iii. That the Fillmore Plaza Redesign, which will include a generally flat-level, curbless area including the center of Fillmore Plaza and the area north of the center area to 2nd Avenue, must be formally reviewed and approved by the City, and that the District will implement any necessary modifications to the Fillmore Plaza Redesign mandated by the City prior to the commencement of construction. The drawings and plans approved by the City for the Fillmore Plaza Redesign shall be available publicly.

iv. That the construction of the Fillmore Plaza improvements will be carried out by the District and the costs will be the responsibility of the District.

v. That the District, pursuant to an appropriate City permit, may close Fillmore Plaza to through vehicular traffic and parking for certain events and days during each year. The City agrees to utilize the structure of a Master Permit, under which the District will submit an application for events, and related street

closures, by December 1 for the subsequent calendar year. For events for calendar year 2011, the application for a Master permit will be submitted by May 1, 2011. The Master Permit will contain particular requirements for the permitted activities. All fees associated with the Master Permit and related street closures included therein shall be waived by the City.

vi. The following, by way of example only and not intended to be a limitation, is indicative of the number and type of events to be covered in the annual application for a Master Permit. To this end, it is the intent of the Parties to encourage the use of Fillmore Plaza for public activities. To this end, it is further the intent of the Parties that Fillmore Plaza will be closed at least thirty-four (34) days a year, with four (4) of said thirty-four (34) days being RNO days included in the Master Permit as described below in Subsection F below:

A. For five days for the Cherry Creek Arts Festival, which takes place during Independence Day weekend;

B. For four days for Cherry Creek Food and Wine Festival, which takes place in August;

C. One day per week during the summer months. The day of the week will be determined by the District. For example, Fillmore Street might be closed every Sunday beginning the Sunday immediately preceding Memorial Day and ending and including the Sunday immediately preceding Labor Day;

D. Thanksgiving Day and Christmas Day;

E. For four days for the District-wide Sidewalk Sale, which takes place in July;

F. Each RNO shall be entitled to request one closure (and related event) of Fillmore Street between 1st and 2nd Avenues for one day and/or evening, if such request is submitted to the District in sufficient time to be included in the Master Permit application. For such events the District will pay street closure costs and the RNO will pay event costs. At the sole option of the District, the District may agree to be a co-sponsor of one or more these four events. This provision does not

preclude the right of any RNO to make additional requests for permits from the City for which the RNO will be responsible for all costs.

G. For all closures/events sponsored by third parties, including RNOs, except for the four specifically addressed in subsection F above, the sponsor will pay the District a reasonable fee, as set by the District, for the use of Fillmore Plaza and the improvements made by the District.

- b. The City hereby agrees and acknowledges:
 - i. The City will use its good faith efforts to review and approve the Fillmore Plaza Redesign as described herein and as will be submitted in appropriate detail and drawings by the District, except for any necessary modifications required.
 - ii. City shall provide the District annually with a Master Permit approving events set forth in the District's annual Master Permit application to the extent it can in its sole discretion, including an approval plan for street closure of Fillmore between 1st and 2nd Avenues.

2. FILLMORE PLAZA RIGHT OF WAY MAINTENANCE AND REPAIR:

- a. The Parties hereto acknowledge that the City will continue to own and exercise regulatory authority over the Fillmore Plaza right of way, and that following construction of the Fillmore Plaza improvements, the District agrees to maintain and repair, at its cost, the Fillmore Plaza right of way related to the street itself. Such maintenance and repair obligations of the District include: maintenance of paving systems in the vehicular areas, maintenance of removable bollards, snow removal, maintenance of any street closure barricades or signage, and other routine street maintenance activities.
- b. The City shall maintain and repair all traffic signals at the intersection of Fillmore Street and 1st Avenue and the intersection of Fillmore Street and 2nd Avenue as necessary and at no cost to the District. The City shall also maintain all parking meters and related regulatory signage installed on Fillmore Street between 1st and 2nd Avenues.
- c. The District will maintain the storm drainage system for Fillmore Plaza, including the trench drains and drain inlets, drainage pipes and cleanouts and water quality devices.

From the point downstream of the water quality devices to and including the City owned storm drainage lines in 2nd Avenue, the City will provide the maintenance of those facilities. Likewise, the City will maintain storm drainage inlets and lines in 1st Avenue.

d. If the City or its agent, including any Franchisee, as defined in Section 49-192 of the Denver Revised Municipal Code, performs work on behalf of the City or its agent including any Franchisee, in the Fillmore Plaza public right of way or street that results in damage or destruction of any District improvements, the City agrees to attempt to cause the damage or destruction to be repaired in a timely manner, in accordance with the applicable ordinances, permits and agreements. The City will attempt to have the damages repaired to the District's standards; however the Parties acknowledge that such repairs may not be to the District's standards.

e. The Parties agree if any other utility or service provider including cable, telecommunications, fiber optic or other similar service provider that requires access to underground cables, pipes or other systems, performs work in the Fillmore Plaza public right of way or street that results in damage or destruction of any District improvements, the City agrees to attempt to cause the damage or destruction to be repaired in a timely manner, and to return the surface condition of Fillmore Plaza to at least the quality and finish that was existing prior to the performance of the work, all to the reasonable satisfaction of District (however this may not always be possible), or otherwise in accordance with the applicable ordinances, permits and agreements.

f. The District agrees to cooperate with the City or its agent, including its Franchisees or service providers, to facilitate such repair work described in sections 2.c and 2.d and 2.e above.

3. FILLMORE PLAZA EVENTS:

a. The District has established a Fillmore Plaza Event Advisory Group (the "EAG") as a resource to the Board's Marketing Committee, and the EAG will be comprised as follows:

i. The EAG shall be comprised of BID representatives who will be appointed by the BID. In addition, one of the members will be the Councilperson for the City Council District that includes the area of Cherry Creek North, or that

person's designee; two of the members will be appointed by the Cherry Creek North Neighborhood Association; one of the members will be appointed by Country Club Historic Neighborhood; and one of the members will be appointed by Cherry Creek East Association. The EAG members appointed by the Cherry Creek North Neighborhood Association, Country Club Historic Neighborhood, and Cherry Creek East Association shall be mutually agreeable to the Board and the duly authorized City Council District Councilperson.

b. The EAG shall be advisory in nature, and will inform the Board concerning the event portion of the District's annual operating plan. The Parties acknowledge that the EAG's input will be an important part of the District's events strategic planning process, and that the EAG's recommendations made to the Board will help inform the District's annual operating plan. The Board shall consider EAG's input and participation in event planning, but the Board shall retain sole discretion regarding the planning, scheduling and implementing of Fillmore Plaza events, and ultimately the City has the authority to approve permits for events for Fillmore Plaza.

i. The City and the District acknowledge that the procedures for applying for a City permit for events and street closures not included in the Master Permit will be as follows: If the District is seeking an event not included in the Master Permit, the District shall apply for all applicable event and street closure permits with the City, and the City in turn will have a goal of responding within two business days.

ii. If a third party is seeking an event permit not included in the Master Permit, it will first submit a permit application to the District which will have the EAG review it, make a recommendation to the District, and the District will in turn make a recommendation to the Manager of Public Works ("Manager"), but the Manager will have the decision-making authority on whether a permit is granted.

iii. The District will provide a written annual report to the City, EAG, and RNOs indicating the event activities and the number of street closure days, for the previous year, as part of the District's annual operating plan and budget submitted to City Council. The District will also provide, as part of its annual operating

plan and budget, the list of closures/events being planned for the next year and which it intends to include in its Master Permit application.

4. **COORDINATION AND LIAISON:** Each party shall coordinate fully all services with the other through personnel designated by the respective parties. The District agrees that during the term of this Agreement it shall fully coordinate all services hereunder with the City, including with the Denver Manager of Public Works or his or her designee or as otherwise directed by the City.

a. The District understands that the City's Manager of Public Works or his/her designee is the City's representatives under this Agreement and through whom contractual services performed under this Agreement shall be coordinated.

b. The District agrees to allow the City to review any of the procedures used by it in performing the services hereunder and to make available for inspection documents used in the preparation of any of the services required hereunder, in order to coordinate the performance of services by the District in accordance with the terms of this Agreement.

c. It is expressly understood and agreed by the parties hereto that nothing contained in this Agreement is intended to or shall grant or limit any power or discretion to the District over and above that granted by the said enabling statute and ordinance, and nothing contained herein is intended to or shall reduce or dilute the role of the City, the City Council, or other members of the governing body of the City as delineated in such enabling statute, ordinance, and City Charter

5. **TERM, DEFAULT, AND TERMINATION OF AGREEMENT:** The term of the Agreement shall commence on the Effective Date and continue for a term of ninety-nine (99) years. The Agreement may be terminated by either party upon one year's written notice to the other party. Despite this provision, the Parties acknowledge that the City may terminate this Agreement at any time it deems necessary to do so consistent with the City's regulatory and police powers.

6. **FINANCIAL OBLIGATIONS:**

a. It is understood and agreed that any and all obligations of the City hereunder, whether direct or contingent, which require funding, are subject to and shall extend only

to prior annual appropriations of money expressly made by the Denver City Council for the purposes of this Agreement, encumbered for the purposes of this Agreement, and paid therefore into the Treasury of the City.

b. It is understood and agreed that any and all obligations of the District hereunder, whether direct or contingent, which require funding, are subject to and shall extend only to funds budgeted by the District's governing body pursuant to Part 12, Article 25 of Title 31, C.R.S., for the purposes of this Agreement, and paid therefor into the appropriate fund account of the District.

c. The City and the District acknowledge that (i) neither party by this Agreement irrevocably pledges present cash reserves for payments in future fiscal years, and (ii) this Agreement is not intended to create a multiple-fiscal year direct or indirect debt or financial obligation of either party.

7. **STATUS OF THE DISTRICT**: It is understood and agreed by and between the parties that the status of the District shall be that of a quasi-municipal corporation and political subdivision under Colorado law, and it is not intended, nor shall it be construed, that either party or any employee or subcontractor of such party is an employee, officer, or agent of the other party for purposes of unemployment compensation, workers' compensation, or for any purpose whatsoever.

8. **WHEN RIGHTS AND REMEDIES NOT WAIVED**: In no event shall any payment or performance hereunder by either party constitute or be construed to be a waiver by such party of a breach of any term, covenant or condition, or default which may then exist on the part of the other party, and the making of any such payment or rendering of such performance when any such breach or default shall exist shall not impair or prejudice any right or remedy available to the non-breaching party with respect to such breach or default; and no assent, expressed or implied, to any breach of any one or more terms, covenants, or conditions of the Agreement shall be construed as a waiver of any succeeding or other breach.

9. **REPORTS AND EXAMINATION OF RECORDS**: Any authorized agent of the City, including the City Auditor or his or her representative, has the right to access and the right to examine any pertinent books, documents, papers and records of the District involving any

transactions related to the Agreement until the later of three (3) years after the final work performed under this Agreement or expiration of the applicable statute of limitations. The District shall furnish to the Manager such statements, records, reports, data and information as the Manager may request pertaining to matters covered by this Agreement. Except as otherwise expressly provided herein, the District will submit said reports on the date(s) designated by the Manager. In addition, the District will submit all regularly required activity and booking reports in formats as specified by the Manager.

10. VENUE GOVERNING LAW: Each and every term, condition, or covenant herein is subject to and shall be construed in accordance with the provisions of Colorado law, the Charter of the City and the ordinances, regulations, and Executive Orders enacted and/or promulgated pursuant thereto. The Charter and Revised Municipal Code of the City, as the same may be amended from time to time, are hereby expressly incorporated into this Agreement as if fully set out herein by this reference. Venue for any action arising hereunder shall be in the City and County of Denver, Colorado.

11. ASSIGNMENT AND SUBCONTRACTING: Neither party is obligated or liable under this Agreement to any party other than the other party named herein. Each party understands and agrees that it shall not assign or subcontract with respect to any of its rights, benefits, obligations or duties under this Agreement except upon prior written consent and approval of the other party, which consent or approval may be withheld in the absolute discretion of such party; and in the event any such assignment or subcontracting shall occur, such action shall not be construed to create any contractual relationship between the other party and such assignee or subcontractor, and each party herein named shall remain fully responsible to the other party according to the terms of this Agreement. Nonetheless, the District may subcontract its operation and maintenance functions for the Fillmore Plaza to other contractors.

12. INSURANCE: The District agrees to keep in force at all times during the term of the Agreement, as the same may be extended as herein provided, a commercial general liability insurance policy covering Fillmore Plaza, including public liability and property damage, in form and company acceptable to City, covering all operations hereunder, including the following minimum amounts:

Commercial General Public Liability: \$1,000,000 per occurrence and in the aggregate

The City and County of Denver, its elected and appointed officials, employees and volunteers will be named Additional Insured. Defense cost coverage for additional insured must be included in excess of the limits of insurance. Any subcontractor utilized by the District under this Agreement must include the City as additional insured on such subcontractor's insurance. The Policy must include a provision that coverage is primary and non-contributory with other coverage or self-insurance maintained by the City. All insurance carried hereunder must be rated at least A- VIII by A.M. Best Company.

13. LIABILITY: Each party hereto shall be liable for the errors and omissions of its agents, servants and employees, to the extent provided by the Colorado Governmental Immunity Act. This obligation shall survive termination of this Agreement.

14. CONFLICT OF INTEREST: The parties agree that no official, officer or employee of the City shall have any personal or beneficial interest whatsoever in the services or property described herein and the District further agrees not to hire or contract for services any official, officer, or employee of the City or any other person which would be in violation of Colorado law, [Denver City Charter provisions 1.2.9. and 1.2.12]. Notwithstanding the foregoing, the Parties acknowledge that the District may, from time to time, contract with District property owners or merchants to provide services to the District.

15. NO THIRD PARTY BENEFICIARY: It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the City and the District, and nothing contained in this Agreement shall give or allow any such claim or right of action by any other or third person on such Agreement, including but not limited to the Neighborhood Associations, subcontractors, subconsultants, and suppliers. It is the express intention of the City and the District that any person other than the City or the District receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

16. **SURVIVAL OF CERTAIN AGREEMENT PROVISIONS:** The parties understand and agree that all terms, conditions and covenants of this Agreement, together with the exhibits and attachments hereto, if any, any or all of which, by reasonable implication or express statement, contemplate continued performance or compliance beyond the expiration or termination of this Agreement (by expiration of the term or otherwise), shall survive such expiration or termination and shall continue to be enforceable as provided herein for a period equal to any and all relevant statutes of limitation, plus the time necessary to fully resolve any claims, matters, or actions begun within that period.

17. **TAXES, CHARGES AND PENALTIES:** Neither party shall be liable for the payment of taxes, late charges or penalties of any nature, except as required by, respectively, the City's Revised Municipal Code or other applicable law.

18. **PARAGRAPH HEADINGS:** The captions and headings set forth herein are for convenience of reference only, and shall not be construed so as to define or limit the terms and provisions hereof.

19. **SEVERABILITY:** It is understood and agreed by the parties hereto that if any part, term, or provision of this Agreement is by the courts held to be illegal or in conflict with any law of the State of Colorado, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular part, term, or provision held to be invalid.

20. **AGREEMENT AS COMPLETE INTEGRATION-AMENDMENTS:** This Agreement is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written amendatory or other Agreement properly executed by the parties. This Agreement and any amendments shall be binding upon the parties, their successors and assigns.

21. **NOTICE TO RNOs.** The Parties acknowledge the City has agreed to give the RNOs ninety days advance written notice of any proposed amendments to this Agreement and any

proposed major design changes to Fillmore Plaza by the District that would require any City approval. The RNOs may comment on such proposals directly to the City.

22. COUNTERPARTS OF THIS AGREEMENT: This Agreement shall be executed in two (2) counterparts, each of which shall be deemed to be an original of this Agreement.

23. SUPPLEMENTARY DOCUMENTS: The following documents are attached and/or incorporated herein and made part of this Agreement:

Exhibit "A", District's Insurance Certificate.

The terms and conditions of Section 12 hereof, shall control over any contradictory or inconsistent terms and conditions which may be found or contained in the above referenced attached Exhibit A.

24. NOTICES: Any notice given hereunder may be sent by first class mail to the addresses set forth below:

If to the City:

Mayor
City and County of Denver
Third Floor
1437 Bannock
Denver, CO 80202

With Copies to:

Manager of Public Works
City and County of Denver
201 West Colfax Avenue, Dept. 608
Denver, CO 80202

City Attorney
Room 353
1437 Bannock
Denver, CO 80202

If to the District:

Cherry Creek North Business Improvement District
Attn: President
299 Milwaukee Street, Suite 201
Denver, CO 80206

25. LEGAL AUTHORITY:

a. The District assures that it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement.

b. The person or persons signing and executing this Agreement on behalf of the District do hereby warrant and guarantee that he/she or they have been fully authorized by the District to execute this Agreement on behalf of the District and to validly and legally bind the District to all the terms, performances and provisions herein set forth.

c. The City shall have the right, at its option, to either temporarily suspend or permanently terminate this Agreement, if there is a dispute as to the legal authority of either the District or the person signing the Agreement to enter into this Agreement. The City shall not be obligated to pay District for any performance of the provisions of this Agreement after the City has suspended or terminated this Agreement as provided in this Section.

26. REASONABLENESS OF CONSENT OR APPROVAL: Whenever under this Agreement “reasonableness” is the standard for the granting or denial of the consent or approval of any party hereto, such party shall be entitled to consider public and governmental policy, moral and ethical standards, as well as business and economic considerations.

27. PRIOR AGREEMENT: This Agreement shall supersede and control the relationship between the City and the District regarding their respective rights and obligations for Fillmore Plaza.

28. POLICE POWERS: Nothing in this Agreement shall impair the City’s exercise of its police powers and regulatory authority.

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

CITY

**CITY AND COUNTY OF DENVER,
COLORADO**

By: _____
Mayor

Attest:

By: _____
STEPHANIE Y. O'MALLEY, City Clerk and Recorder,
Ex-Officio Clerk of the City and County of Denver

APPROVED AS TO FORM

RECOMMENDED AND APPROVED

DAVID R. FINE, Attorney
for the City and County of Denver

By: _____
Manager of Public Works

By: _____
Assistant City Attorney

REGISTERED AND COUNTERSIGNED

By: _____
Manager of Finance
Contract Control No. _____

By: _____
Auditor

DISTRICT

**CHERRY CREEK NORTH BUSINESS
IMPROVEMENT DISTRICT**

Taxpayer (IRS) Identification No. [_____]

ATTEST:

By: _____

Title: _____

By: _____

Title: _____

APPROVED AS TO FORM:

By: _____

Attorney for CCNBID