

**EXECUTION COPY**

**AGREEMENT**

This Agreement is entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, by and between the City of Kent ("City"), a municipal corporation of the State of Washington and the Port of Seattle ("Port") a municipal corporation of the State of Washington to implement the Memorandum of Understanding among the principal parties of the Freight Action Strategy Transportation ("FAST") corridor, by sharing funds to construct grade separations on S. 228th Street in Kent, Washington.

**RECITALS**

**WHEREAS**, the assurance of continued freight and passenger mobility throughout Puget Sound is an issue of critical strategic importance to the Port; and

**WHEREAS**, projected growth in cargo volumes and the implementation of commuter rail service by the Regional Transit Authority are expected to generate more frequent mainline rail traffic, with a projected increase in traffic congestion at many of the at-grade crossings along major arterials; and

**WHEREAS**, the Port , the State of Washington (State), King County (County), the Port of Tacoma, the City, and other local jurisdictions have developed and signed the Freight Action Strategy Memorandum of Understanding ("FAST MOU") for grade separations and other road and rail improvements; and

**WHEREAS** S. 228<sup>th</sup> Street is listed on Attachment B to the FAST MOU as among FAST Corridor Phase II Projects for immediate implementation; and

**WHEREAS** the S. 228<sup>th</sup> Street Project calls for road improvements along a three mile corridor, and for grade separations at the Burlington Northern Santa Fe ("BNSF") rail line, and at the Union Pacific ("UP") rail line; and

**WHEREAS**, the first phase of the S. 228<sup>th</sup> Street Project (road improvements) is complete, open to traffic, and provides access from the Kent valley up the west hill to I-5; the second phase (grade separation at the BNSF) was completed in 2009 and provides uninterrupted access over the BNSF rail lines; and

**WHEREAS**, the final phase of the S. 228<sup>th</sup> Street Project (grade separation at the UP crossing) ("Project") is being designed and permitted in 2017; and

**WHEREAS**, the grade separations, which will complete the S. 228<sup>th</sup> Street Project, are critical to address the impacts of increased rail traffic resulting from the reopening of Stampede Pass to freight traffic, and will specifically benefit the Port by providing a seamless connection between the forty million square feet of warehouse and industrial space within the Kent valley, the Port of Seattle and Sea-Tac Airport; and

**WHEREAS**, the grade separations, while located on arterials within the corporate limits of the City, will benefit all of the parties to the FAST MOU by promoting the efficient movement of passengers and cargo throughout the region; and

**WHEREAS**, pursuant to the FAST MOU and the 2009 interlocal agreement between the Port and the City (“2009 Interlocal”), the Port made a funding commitment to the 228<sup>th</sup> Street Project of One Million One Hundred and Ninety Thousand Dollars (\$1,190,000.00) for use in construction costs only; and

**WHEREAS**, the Port paid \$595,000 to the City under the 2009 Interlocal for construction costs associated with the BNSF grade separation project; and

**WHEREAS**, the remaining Port contribution of \$595,000 will be allocated to the Project scheduled for completion in 2019.

## **AGREEMENT**

### **1. PROJECT DESCRIPTION**

Construction of a grade separation at the UP rail lines on S. 228th Street to complete the S. 228th Street corridor between 84th Avenue S. and Military Road/I-5 with four (4) travel lanes as reflected in Exhibits A, B and C attached hereto.

### **2. TERMS AND CONDITIONS**

2.1 At-Grade Railroad Crossing: Upon completion of the Project, the existing at-grade crossing will be permanently closed.

2.2 Lead Agency: The City shall be lead agency for the Project in regard to SEPA/NEPA compliance and obtaining all necessary permits. As lead agency the City shall be responsible for accomplishing all aspects of the Project.

2.3 Consultants and Contractors: The City shall retain consultants and contractors for the purposes that include, but are not limited to the design, right-of-way acquisition, inspection, and construction of the Project. The City, at its sole discretion, shall select, hire, or coordinate with other agencies to retain consultants or contractors.

2.4 Value Engineering: A value engineering study was performed summer 2016, on the Project.

2.5 Contact Persons: The parties to this Agreement shall designate person(s) to act as liaison for the Project. The contact persons shall meet on a scheduled basis at a frequency appropriate to the status of the Project.

2.6 Schedule/Scope: Design work on the Project is estimated to be completed in 2017 with construction estimated to commence in 2017, and Project completion in 2019. The City shall determine the schedule for the Project based on funding, right-of-way acquisition and other items that dictate the schedule. The Port shall be notified of any schedule changes. Construction change orders that do not change Project functionality and benefits to the Port, or the overall scope or general schedule of the Project will not require coordination or documentation with the Port. Any changes to the functionality of the Project and benefits to the Port, as described in Section 1, and further illustrated in Exhibits A, B and C shall require coordination with the Port. The Port's funding is contingent on the Project being constructed as described in Section 1.

2.7 Project Schedule: Upon commencement of Project construction the City shall provide the Port with a report that includes a copy of the WSDOT/FHWA approved Project schedule (or analogous format), and final engineer's estimate with contract bid items or summary of values.

### **3. PAYMENT**

3.1 Reimbursement: The Port agrees to reimburse the City for the direct costs of construction for the Project, up to a maximum amount of Five Hundred and Ninety-five Thousand Dollars (\$595,000), inclusive of any applicable taxes. The direct costs of construction include: mobilization, maintenance of traffic, temporary erosion and sedimentation control, earthwork, pavement, drainage, structures, traffic items (including signage, signalization, lighting, Intelligent Transportation Systems, and pavement markings), retaining walls, landscaping, environmental mitigation, and utilities.

3.2 City Request for Payment: Total construction cost is currently estimated to be Twenty Million Dollars (\$20,000,000). The Port shall make three (3) payments to the City for the Project as follows:

- a. The first payment of Two Hundred and Fifty Thousand Dollars (\$250,000), after the City has made progress payments to the Project contractor totaling at least 50% of the construction contract value. This is expected in 2018. At the time of making application for payment the City shall provide to the Port a Project progress report. The progress report will include a narrative describing the Project progress since commencement of construction, an updated Project construction schedule showing percent completion of the major work elements and a tabulation of the

construction progress payments made, such that fifty percent (50%) completion of the Project can be determined.

- b. The second payment of Two Hundred and Fifty Thousand Dollars (\$250,000), upon the City's acceptance of the Project's substantial completion (as defined in the construction contract) and the Port's receipt of a copy of the letter from the City to the Project contractor acknowledging such. The Port reserves the right to request an inspection of the Project to confirm it is completed and operational.
- c. The final payment of Ninety-five Thousand Dollars (\$95,000), upon the City's final acceptance of the Project (as defined in the construction contract) and the Port's receipt of a letter from the City's Project Manager attaching the Certificate of Final Acceptance. This is expected in 2019.

3.3 Payment: The Port agrees to make payments to the City within thirty (30) days from receipt of a billing from the City and other documents as may be required under Section 3.2.

#### **4. AMENDMENT**

Either Party may request changes to the provisions contained in this Agreement. Any change to this Agreement must be mutually agreed to by both Parties, in writing and executed with the same formalities as the original Agreement.

#### **5. NOTIFICATION**

Any notice required or permitted to be given pursuant to this Agreement shall be in writing, and shall be sent postage prepaid by U.S. Mail, return receipt requested, to the following addresses unless otherwise agreed to by the parties to this Agreement:

To the City:                      Project Manager, S. 228<sup>th</sup> Street Grade Separation  
City of Kent  
400 W. Gowe Street  
Kent, WA 98032-5895

To the Port:                      Regional Transportation Manager  
Port of Seattle  
2711 Alaskan Way  
Seattle, WA 98121

#### **6. RECORDS RETENTION AND AUDIT**

During the progress of the work and for a period not less than six (6) years from the date of the Port's final payment to the City, the records and accounts pertaining to the Project and accounting thereof are to be kept available for inspection and audit by the Port, the State of Washington and the federal government. Copies of all records, accounts, documents, or other data pertaining to the Project will be furnished upon

request. If any litigation, claim, or audit is commenced, the records and accounts along with supporting documentation shall be retained until all litigation, claim, or audit finding has been resolved even though such litigation, claim, or audit continues past the six (6) year retention period. This provision is not intended to alter or amend records retention requirements established by applicable state and federal laws.

## **7. DISPUTES**

The designated representatives under Section 5.0, NOTIFICATION, shall use their best efforts to resolve disputes between the Parties. If the designated representatives are unable to resolve a dispute, then the responsible Project directors for each party shall review the matter and attempt to resolve it. If the Project directors are unable to resolve the dispute, the matter shall be reviewed by the department director or chief executive officer of each party or his or her designee. The parties agree to exhaust each of these procedural steps before seeking to resolve disputes in a court of law or any other forum.

## **8. EFFECTIVENESS AND DURATION**

This Agreement is effective on the date stated in the introductory clause and will remain in effect until Project completion, unless otherwise stated herein or unless amended or terminated.

## **9. TERMINATION**

Either party may terminate this Agreement at any time upon thirty (30) days written notice. If either party decides to terminate this Agreement, the Port shall reimburse the City for all costs payable under this Agreement and all non-cancelable obligations that the City incurred prior to termination. For the purposes of this Agreement, “non-cancelable obligations” are defined as those costs that the City is obligated to pay as of the day that either party provides notice that it is terminating this Agreement.

## **10. INDEMNIFICATION AND HOLD HARMLESS**

10.1 To the maximum extent permitted by law, the City shall protect, defend, indemnify and hold harmless the Port, its officers, officials, employees and agents from any and all costs, claims, demands, suits, actions, judgment and/or awards of damages, including but not limited to reasonable attorney’s fees, to the extent arising out of, or in any way resulting from, the City’s own negligent acts or omissions, or the negligent acts or omissions of the City’s employees, agents and contractors. The City agrees that its obligations under this Section extend to any claim, demand and/or cause of action brought by, or on behalf of, any of its employees or agents. For this purpose, the City hereby waives, with respect to the Port only, any immunity that would otherwise be available against such claims under the Industrial Insurance provision of Title 51 RCW to the extent necessary to provide indemnification as required under this Agreement.

10.2 The indemnification, hold harmless, and/or waiver obligation described in this Section shall survive the termination of this Agreement. In any action to enforce the provisions of the Section each party shall be responsible for its own costs and attorneys' fees.

**11. VENUE**

This Agreement shall be deemed to be made in the County of King, State of Washington, and the legal rights and obligations of the City and the Port shall be determined in accordance with the laws of the State of Washington. All legal actions in connection with this Agreement shall be brought in the County of King, State of Washington.

**12. OTHER PROVISIONS**

12.1 Severability: A determination by a court of competent jurisdiction that any provision of this Agreement or any part thereof is illegal or unenforceable shall not cancel or invalidate the remainder of such provision of this Agreement, which shall remain in full force and effect.

12.2 Interpretation: The captions of the Sections of this Agreement are not a part of the terms or provisions of this Agreement. Whenever required by the context of this Agreement, the singular shall include the plural and the plural shall include the singular. The masculine, feminine and neuter genders shall each include the other.

12.3 Waivers: Either party's failure to enforce any provision of this Agreement shall not be a waiver and shall not prevent either Party from enforcing that provision or any other provision of this Agreement in the future.

12.4 Exhibits: This Agreement includes the following exhibits: Exhibit A: 228th Vicinity Map/Project Benefits; Exhibit B: Project Plan and Profile, and Exhibit C: Typical Cross Section which shall be deemed incorporated into this Agreement by this reference.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date stated in the introductory clause.

**PORT OF SEATTLE**

**CITY OF KENT**

\_\_\_\_\_  
David Soike  
Interim Chief Executive Officer

\_\_\_\_\_  
Suzette Cooke  
Mayor

[Additional signatures on next page]

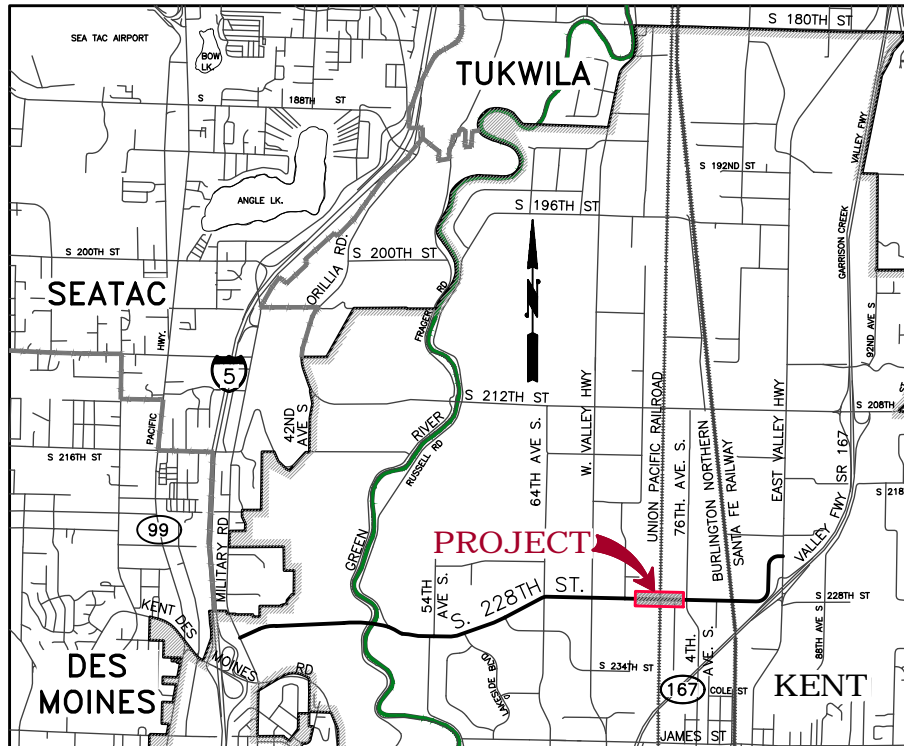
**APPROVED AS TO FORM:**

\_\_\_\_\_  
Port of Seattle Legal Department

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City of Kent Law Department

## South 228th Street Union Pacific Railroad Grade Separation



### Project Benefits:

The South 228th Union Pacific Grade Separation will support and reduce congestion of freight moving through Kent's massive warehouse and industrial core to the Port of Seattle, Sea-Tac Airport and the freeway system. Congestion affects the region's ability to compete with other ports and manufacturing centers nationally and internationally. The Kent valley's warehouse and industrial complex is the 4th largest on the west coast.

Additional project benefits include:

- Increased rail and roadway capacity
- Enhanced safety
- Improved freight mobility
- Provides regional connections between thousands of businesses, employers and 40 million square feet of warehouse/industrial space.

The rail traffic on the UP Railroad mainline is rising as a consequence of increased demand for movement of freight traffic in the Puget Sound area.

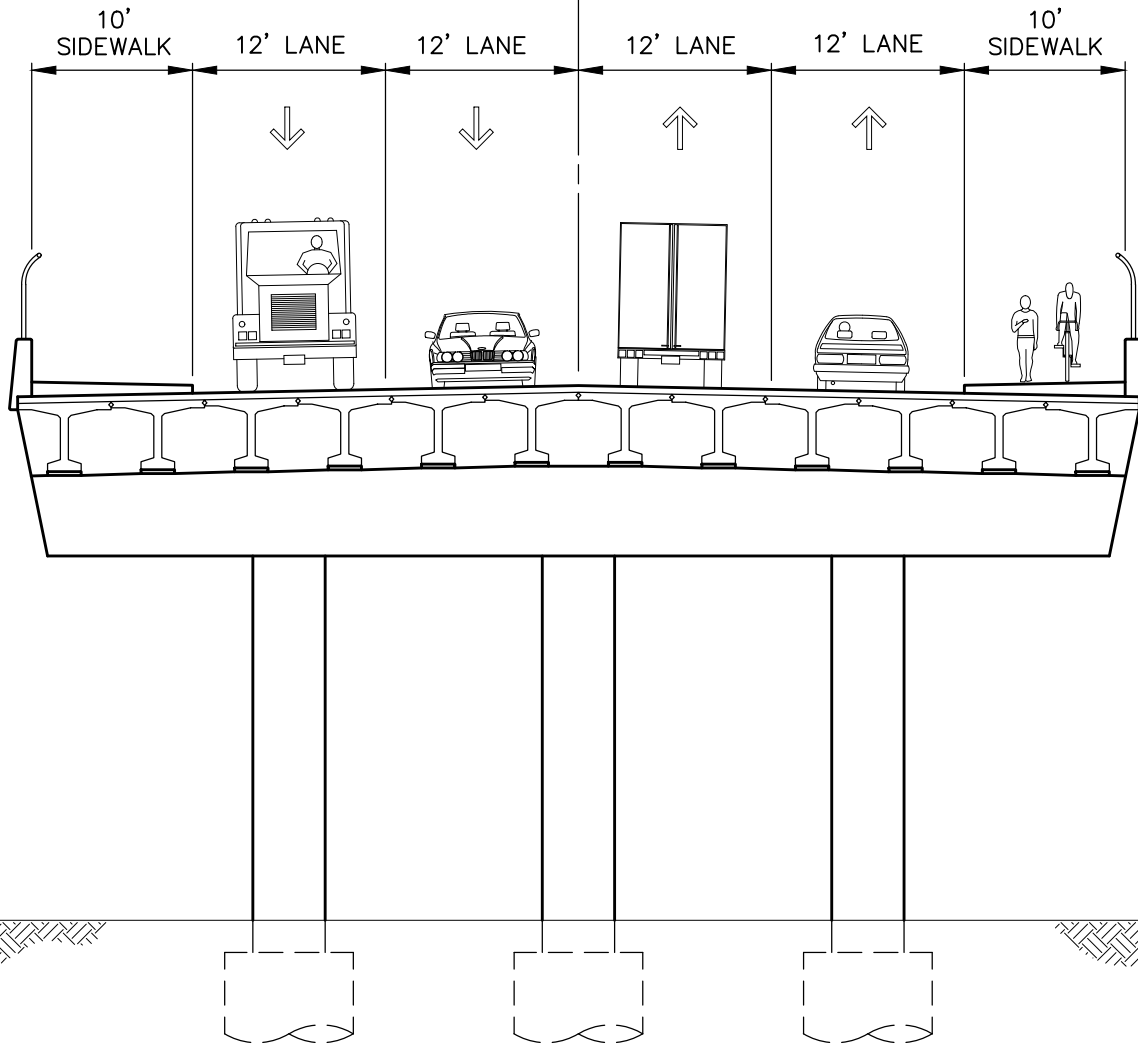
With the completed S. 228th Street corridor to the west and the completed grade separation at the BNSF, the UP grade separation is the third and final phase to complete the S. 228th Street corridor. This will provide a seamless connection between the Kent valley and the I-5 corridor and will be a conduit for the shipment of freight to and from Kent's vast freight network.







S. 228th STREET



CITY OF KENT  
ENGINEERING DEPARTMENT

S 228TH ST UPRR  
GRADE SEPARATION  
TYPICAL CROSS SECTION

SCALE NOT TO SCALE

DATE 2017

EXHIBIT

C