

FIRST RESTATED DEVELOPMENT AGREEMENT

THIS FIRST RESTATED DEVELOPMENT AGREEMENT (this “**Agreement**”) is made on this ____ day of _____ 2017, by the MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, a public body corporate and agency of the State of Maryland (“**Commission**”), and COALITION FOR THE CAPITAL CRESCENT TRAIL, INC., a Maryland non-stock corporation (the “**Coalition**”).

R E C I T A L S:

- A. The Commission is a public body corporate and agency of the State of Maryland, created and existing under Titles 14 through 27 of the Land Use Article of the Annotated Code of Maryland, and is engaged in performing governmental functions of acquiring, developing, maintaining and operating for the present and future inhabitants of the Metropolitan Districts in Montgomery and Prince George’s Counties as set forth under the Regional District Act, public parks and recreation areas within said Metropolitan Districts.
- B. The Commission is the owner of real property on which certain portion of a trail commonly known as the Capital Crescent Trail is located (the “**Trail**”).
- C. Coalition is a not-for-profit organization whose primary mission is to serve as a non-profit volunteer citizens’ group promoting a first class development of the 11.2 mile Rail-to-Trail conversion from Georgetown, Washington, D.C., to Silver Spring, Maryland, for multi-purpose, recreational use.
- D. On May 17, 2012, the Coalition proposed to and obtained approval from Montgomery County Planning Board (the “**Board**”) to construct, at its own expense, a trail plaza on the Trail, at the location shown on Exhibit A, for the benefit of Trail users (the “**Project**”), with cooperation from the Commission’s Montgomery County Parks Department (the “**Montgomery Parks**”).
- E. In accordance with the Board’s aforesaid approval, the Commission and Coalition executed a Development Agreement on or about October 12, 2012, which set forth the parties’ agreement on their respective obligations (the “**2012 Agreement**”).
- F. Since the 2012 Agreement, the Coalition has not made significant progress towards the construction of the proposed trail plaza on the Trail, and has proposed to Montgomery Parks that Montgomery Parks take on the responsibility of constructing the trail plaza, with the Coalition raising funds to enable said construction.
- G. Montgomery Parks is agreeable to changing the obligations made under the 2012 Agreement under the terms set forth in this Agreement.

ACCORDINGLY, the parties agree as follows:

1. **Incorporation of Recitals.** The foregoing preamble and Recital are incorporated into this Agreement by reference.
2. **Effect of Agreement.** This Agreement shall replace the 2012 Agreement in its entirety.
3. **Definitions.**

"**Building Permits**" means all permits necessary for the Project to be issued by appropriate municipal or state authorities for construction of the improvements to be lawfully permitted, including but not limited to any required permits for building, grading, stormwater management, sediment control, electrical, fire, mechanical, sign, fence and retaining wall;

"**Change Orders**" has the meaning assigned to it in Section 7;

"**Construction Plans**" means the plans, drawings, and specifications developed by the Coalition pursuant to this Agreement which meet the specifications in accordance with the Commission's design standards and specifications, to construct the Project, including any changes thereto to the extent authorized under this Agreement in view of the provisions of Section 7. The Construction Plans have been approved by the Commission;

"**Contract Documents**" means this Agreement, the Construction Plans, the Project Schedule, and the Project Budget;

"**Contractor**" means any firm, corporation or other entity selected by the Commission to serve as its prime contractor for the Project;

"**Foundation**" means the Montgomery Parks Foundation, a Maryland 501(c)(3) organization;

"**Fundraising Agreement**" has the meaning set forth in Section 4(b)(ii);

"**Laws**" mean all applicable laws, orders, ordinances, codes and regulations of any courts and governmental bodies, agencies and authorities having jurisdiction over the Trail including, without limitation, all zoning, subdivision, building and land use laws;

"**Planning Board**" means the Commission's Montgomery County Department of Planning;

"**Project Budget**" means the budget of \$350,000 developed and financed by the Coalition, including all funds raised for the Project held in escrow by the Foundation, which

has been approved by the Commission, to complete the Project, including but not limited to the costs for design of the Project, all hard and soft costs of construction, all permit fees and costs of approvals as required by Laws, contingency, site work, costs of installation, contingency reserve;

"Project Completion" means the time when construction has been completed in accordance with the Construction Plans, including closure of all outstanding permits issued by any governmental authority for construction of the Project, "as-built" plans of the Project certified by the engineer of record have been submitted to the Commission, and releases of liens have been received from all Contractors who have furnished labor, materials and/or services in the construction of the Project, covering work performed, materials supplied and services rendered;

"Punch List" means the list of construction and clean-up items left to be performed following Substantial Completion, in order for the Project to be completed in accordance with the Construction Plans. The Punch List will be developed by the Commission; and

"Substantial Completion" means that the Project has been constructed and completed in a good and workmanlike manner, in accordance with applicable requirements of Law and in accordance with the Construction Plans.

4. Coalition Obligations.

(a) Design and Plan. The Commission has developed the Construction Plans with the Coalition's input, and all necessary permits required by Laws to construct the Project, including, but not limited to, any Building Permits, have been obtained. The Construction Plans have been approved by the Coalition.

(b) Project Budget.

(i) The Coalition shall finance the Project Budget in the amount of \$350,000.

(ii) The Commission acknowledges that the Coalition is authorized to raise funds for the benefit of the Project and to donate any funds raised through the Coalition (the **"Donated Funds"**) to the Foundation under a separate fundraising agreement entered into, or to be entered into, between the Coalition and the Foundation, pursuant to which the Foundation has agreed to perform certain obligations and functions on behalf of the Coalition under this Agreement (the **"Fundraising Agreement"**).

(iii) The Coalition represents and warrants to the Commission that it has entered into, or will enter into, the Fundraising Agreement, pursuant to which the Foundation, among others, shall act as escrow agent to hold the Donated Funds and remit them to the Commission, to become a part of the Project Budget, to enable the Commission to construct the Project through the Commission's Montgomery County Department of Parks. The Coalition

further represents and warrants to the Commission that the fully signed Fundraising Agreement will be provided to the Commission before it seeks the Planning Board's approval.

(iv) The Commission shall provide a breakdown by line item of the anticipated costs of the construction of the Project, with the Coalition's input. The Project Budget will also identify a contingency reserve equal to 10% of the total hard costs of the Project as shown on the Project Budget. If the Coalition is unable to raise the full amount provided in the Project Budget, the Coalition and the Commission shall reevaluate the Construction Plans and determine (1) how the Construction Plans may be modified to reflect the reduced amount raised for the Project Budget; or (ii) whether the secured Project Budget should be used in alternative ways, as agreed to by the parties.

(c) Project Budget Certification. The Coalition has required or will require the Foundation to provide written certification acceptable to the Commission, accompanied by supporting documentation evidencing that all funds as set forth in the Project Budget will be available for use by the Commission at the time of commencement of construction of the Project. The Commission's Secretary-Treasurer must approve such certification, together with the Project Budget, for purposes of determining that the Coalition will have sufficient funds to complete the Project once construction is commenced. The parties recognize that advances under construction financing vehicles are customarily conditional on compliance with certain lender conditions, such as, without limitation, inspection, lien releases and completion of draw requests. The Coalition has required or will require the Foundation to make its financial books records available for inspection by the Commission's Secretary-Treasurer. The Commission's Secretary-Treasurer may review the Foundation's financial books and records solely for the purpose of confirming the Foundation's certification and may require additional supporting documentation from the Foundation prior to making a decision. The Secretary-Treasurer's access to such books and records, for the purposes of this Agreement, is limited for the purposes stated herein, and the Commission represents that it shall not otherwise utilize or disclose the information contained therein.

(d) Maintenance Cost Contribution. The Coalition shall be responsible for paying to the Commission a minimum of \$5,000 per year for three years, following completion of the construction of the Project, to be contributed toward the Commission's maintenance cost for the Project. The foregoing maintenance cost contribution obligation shall commence and be due on or before the first anniversary of the date when Montgomery Parks issues a written notice of final construction of the Project to the Coalition. Thereafter, subsequent annual maintenance cost contribution shall be due on or before the successive anniversary date of the issuance date thereof. Where necessary, the Coalition shall pay the foregoing maintenance cost contribution through the Foundation for the Commission's benefit, or such other mechanism as instructed by the Commission.

5. Commission Obligations.

(a) Construction. The Commission shall construct the Project subject to the terms

of this Agreement, including and not limited to, (i) engaging the services of construction contractors, subcontractors, professionals, consultants and/or suppliers for the purposes of the Project; (ii) constructing the Project pursuant to the Construction Plans; and (iii) providing oversight and management of the Project.

(b) Bid Forms. The parties acknowledge and agree that the Project will incorporate unique items and features whose costs are difficult to predict. Accordingly, the Coalition agrees that the Commission may utilize add alternates or deducts when it bids the Project to the contractors. The Commission will obtain the Coalition's prior consent for any such use of add alternates or deducts in the bid form used for the Project.

(c) Sole Discretion. For avoidance of doubt, other than the obligation to obtain the Coalition's prior consent regarding the add alternates or deducts in the bid form as set forth in Section 5(b) and other express obligations herein, the Commission has the sole and absolute discretion in constructing the Project, including entering into a final contract with a Commission-selected contractor, change orders, or making design changes in the fields as the Commission deems desirable, without any obligation to consult or obtain consent from the Coalition.

(d) Maintenance. Subject to the Coalition's fulfillment of Section 4(d), following the completion of the Project, the Commission shall maintain the Project in accordance with the Commission's then current standards for similar projects or trails.

6. Planning Board Approval. The parties acknowledge and agree that the Planning Board's approval of this Agreement is a condition precedent to each party's obligation under this Agreement.

7. Change Orders.

(a) No Material Changes. The parties acknowledge and agree that each of them has approved the Construction Plans, and (i) the Coalition shall not make any material changes in the Construction Plans, including any such changes that materially alter, diminish or add to the work to be performed or change the design of the Project, without the prior written consent of the Commission; and (ii) the Commission shall not make or require any material changes in the Construction Plans, including any such changes that materially alter, diminish or add to the work to be performed or change the design of the Project, without the prior written consent of the Coalition. Any changes required by Montgomery County or Maryland State Inspectors (the "**Legally Mandated Changes**") shall not constitute change orders under this Agreement and such Legally Mandated Changes shall become amended to the Construction Plans without further actions by the parties.

(b) Exception to Written Consent. The Commission's prior written consent shall not be required, however, as to any change order which (i) individually (or taken together with another or multiple change order(s) for related work) does not result in a material change to

the design of the Project, and (ii) there remains sufficient proceeds in the contingency reserve line item of the Project Budget to cover such change order. For purposes of Section 7, "**material change**" means one which does not exceed a cost difference of \$10,000 for any discrete cost or category of costs, nor in the aggregate result in a cost difference more than \$20,000. The change (material or non-material) must be consistent with the design intent of the Construction Plans as to function, quality, durability, and aesthetic character, and not contrary to Commission design standards. The Commission shall submit to Coalition copies of all change orders.

8. Accounting Records. The Coalition has required or will require the Foundation to keep full and detailed accounts of the Donated Funds and exercise safekeeping over them. The Coalition has further required or will require that the Commission and the Commission's accountants shall be afforded all reasonable access to, and shall be permitted to inspect and copy, at its sole cost and expense, the Foundation's records, books, correspondence, instructions, drawings, receipts, memoranda and other data relating to the Donated Funds. The foregoing shall not be construed to include any communications with or between the Foundation's own members, managers and officers, its attorneys, and its tax and financial advisors.

9. Default; Termination. If the Coalition fails to cause the Foundation to remit the full Project Budget to the Commission by December 31, 2018, such failure will constitute default under this Agreement and the Commission may terminate this Agreement upon written notice to the Coalition.

10. Approvals. Unless otherwise expressly provided in this Agreement, wherever in this Agreement the approval, certification, or consent of any party is required, such approval shall not be unreasonably withheld, conditioned or delayed.

11. Remedies Cumulative. All rights and remedies enumerated in this Agreement shall be cumulative and mention in this Agreement of any specific right or remedy shall not preclude the Commission from exercising any other right or remedy now or hereafter allowed by or available under any statute, ordinance, rule of court, the common law, or otherwise at law or in equity or both.

12. No Waiver. The Commission's failure, at any time or times, to require strict performance by the Coalition of any provision of this Agreement shall not waive, affect, or diminish any right of the Commission thereafter to demand strict performance and compliance herewith or therewith. No waiver hereunder shall be effective unless signed by the party granting the waiver and then is only effective for the specific instance and purpose for which it is given.

13. Entire Agreement. This Agreement embodies and constitutes the entire understanding between the parties with respect to the transaction contemplated herein, and all prior agreements, understandings, representations, and statements, oral or written, are merged into

this Agreement. Neither this Agreement nor any provisions hereof may be waived, modified, discharged or amended except by a written instrument, dated and signed by the parties hereto.

14. Severability. If any provision or clause of this Agreement is held invalid or unenforceable, that provision or clause shall be severed from this Agreement and such holding shall not affect the validity of the remainder of this Agreement.

15. Governing Law and Jurisdiction. This Agreement is made pursuant to, and shall be construed and enforced in accordance with, the laws of the State of Maryland, and shall be exclusively enforced in a court of competent jurisdiction in Montgomery County, Maryland.

16. Notices. All communications required or permitted to be served or given hereunder (“**Notices**”) shall be in writing and shall be personally delivered or sent by registered or certified mail, return receipt requested, postage prepaid, to the Commission or the Coalition at the respective addresses set forth below.

Commission: Montgomery County Department of Parks
Maryland-National Capital Park and Planning Commission
9500 Brunett Avenue
Silver Spring, MD 20901
Attn: Director of Parks

copy to: Office of General Counsel
Maryland-National Capital Park and Planning Commission
6611 Kenilworth Avenue, Suite 200
Riverdale, Maryland 20737

Coalition: Ron Trip
5330 Sherrill Avenue
Chevy Chase, MD 20815

copy to: Anthony Marra, Esq.
30 West Kirke Street
Chevy Chase, MD 20815

Either party, by notice given as aforesaid, may change its address for all subsequent Notices. Notice shall be deemed given when mailed in accordance herewith.

17. No Partnership or Joint Venture. Nothing herein contained is intended or shall be construed in any way to create or establish the relationship of partners or a joint venture between the Commission and the Coalition. None of the officers, agents or employees of any party shall be deemed to be employees or agent of any other party for any purpose whatsoever.

18. Budget Appropriations. The Commission shall, in accordance with its normal budgetary procedures, make timely application for, and use reasonable efforts to obtain, budget appropriations reasonably calculated to provide all funds necessary for the Commission's performance of and compliance with all of the material terms, conditions and covenants contained in this Agreement. Notwithstanding anything to the contrary in this Agreement, the Commission shall not be deemed to be in default in the performance of or compliance with any of the terms, conditions, or covenants contained in this Agreement if funds are not specifically budgeted and appropriated therefore at the time of the alleged default. Certification by the Secretary-Treasurer of the Commission that funds are not specifically budgeted and appropriated therefore shall be conclusive as to that issue.

19. Waiver of Jury. Each of the parties hereto irrevocably waives any and all right to trial by jury in any legal proceeding arising out of or relating to this agreement or the transactions contemplated hereby.

20. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, all parties hereto, their legal representatives, guardians, successors, and their assigns to the extent, but only to the extent, that assignment is provided for in accordance with, and permitted by, the provisions of this Agreement.

21. Authorized Signature. Each party represents and warrants that it is authorized to enter into this Agreement, that the person signing on its behalf is duly authorized to execute this Agreement, and that no other signatures are necessary.

22. Obligations Surviving Termination. If this Agreement is revoked or otherwise terminated for any reason other than default of the Coalition, all liabilities of the parties shall be adjusted as of the effective date of termination. Any termination hereof by reason of a default of the Coalition shall not affect any obligation or liability of the Coalition under this Agreement that accrued prior to the effective date of termination, and all such obligations and liabilities of the Coalition shall survive such termination.

23. Force Majeure. Neither the Commission nor the Coalition shall be considered to be in default of any of their obligations hereunder if the performance of such obligations is delayed by causes beyond their control, including but not restricted to, strikes, lockouts, actions of labor unions, riots, explosions, storms, floods, acts of God or of the public enemy, insurrection, mob violence, civil commotion, sabotage, malicious mischief, vandalism, inability (notwithstanding good faith and diligent efforts) to procure, or general shortage of labor, equipment, facilities, materials or supplies in the open market, failures of transportation, fires, other casualties, epidemics, quarantine restrictions, freight embargoes, severe weather, inability (notwithstanding good faith and diligent efforts) to obtain governmental permits or approvals, or delays of contractors or subcontractors due to such causes, it being the purpose and intent of this Section 25 that in the event of the occurrence of any such delay, the time or times for the performance of the affected obligations hereunder shall be extended for the period of the delay (including any time reasonably required to recommence performance due to such delay).

The affected party shall use reasonable efforts to remedy with all reasonable dispatch the cause or causes preventing it from carrying out its obligations. Notwithstanding the above, the Parties hereto may not rely on their own acts or omissions as grounds for delay in performance.

24. Corporate Status. The Coalition represents, warrants, and covenants that, at all times during the term of this Agreement, the Coalition shall: (a) remain a Maryland non-profit corporation; (b) remain an approved tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code; and (c) maintain its corporate status in good standing with the Maryland Department of Assessments and Taxation.

[SIGNATURE PAGE FOLLOWS]

TO EVIDENCE the parties' agreement herein, they have signed and delivered it on the date written below.

**COALITION FOR THE CAPITAL
CRESCENT TRAIL, INC.**

Date: _____

By: _____
Name:
Title:

**MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION**

Date: _____

By: _____
Patricia Colihan Barney,
Executive Director

ATTEST:

Date: _____

By: _____
Joseph Zimmerman,
Secretary-Treasurer

Exhibit A



CAPITAL CRESCENT TRAIL - PLAZA



Map compiled by PDD Staff.
Information from M-NCPPC
GIS—intended for general
planning purposes only.

2011 Photo

April 2012



SCALE: 1" = 300'

