

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding and Agreement (“Agreement”) made this 26th day of August 2004 among the MTA Capital Construction (hereinafter referred to as the “MTA CC”), acting for itself and on behalf of the MTA New York City Transit (“MTA NYCT”), which are respectively a subsidiary and affiliate of the Metropolitan Transportation Authority (“MTA”), and which are also public benefit corporations having offices at 2 Broadway, New York, NY (the MTA, MTA NYCT and MTA CC are collectively referred to herein as “MTA”, unless otherwise specified) and the City of New York (hereinafter referred to as the “City”), a municipal corporation, acting by and through the Department of Parks and Recreation (hereinafter referred to as “DPR”) with offices at the Arsenal, 830 Fifth Avenue, Central Park, New York, NY 10021.

WITNESSETH

WHEREAS, the MTA NYCT, pursuant to the New York State Public Authorities Law and an Agreement of Lease with the City (the “Master Lease”), manages and operates the New York City Transit System (the “Railroad”) including the South Ferry Terminal Station, and

WHEREAS, the South Ferry Terminal Station is presently located with access on and under portions of parkland consisting of Peter Minuit Plaza and Battery Park which parkland is under the jurisdiction of DPR, and

WHEREAS, the MTA CC, on behalf of MTA NYCT, intends to have contractors perform work whose scope includes the construction of a new two-track terminal station, three entrances, a new connection between the 1/9 Line at South Ferry and the N/R Line at Whitehall Street Station, and one new ADA accessible elevator as part of the comprehensive reconstruction of the South Ferry Terminal Station (the “Project”) in connection with the redevelopment of Lower Manhattan, and

WHEREAS, the design for the Project contemplates the use of portions of the Peter Minuit Plaza and Battery Park, which will require alienation of such parkland through an act of the New York State Legislature, and

WHEREAS, MTA agrees to undertake certain restorations and improvements to Battery Park, as particularly set forth herein, (the “DPR Work”), as part of the consideration for the City’s alienation of such parkland, and

WHEREAS, the MTA and DPR have determined that it would be most cost efficient and cost effective to have one entity coordinate and perform the Project and the DPR Work, and

WHEREAS, the MTA will also make payment to the City as additional consideration for the alienation of such parkland, as more fully set forth herein, and

WHEREAS, DPR is willing to cooperate in the legislative process to alienate portions of Peter Minuit Plaza and Battery Park to permit construction of the Project.

NOW, THEREFORE, in consideration of the promises set forth below, and other good and valuable consideration, the receipt of which is hereby acknowledged, and based upon the foregoing recitals, which form a part of this Agreement, it is hereby agreed by the undersigned as follows:

ARTICLE 1 - ACQUISITION OF PROPERTY FOR THE PROJECT

A. Alienation (i) MTA has sought and received approval from the State Legislature to alienate certain parkland property consisting of land (more fully described in Section 3 of the legislation), permanent easements (more fully described in Section 4 of the legislation) and temporary easements (more fully described in Section 5 of the legislation), constituting portions of Peter Minuit Plaza and Battery Park that are required

to construct and operate the Project. A copy of the alienation legislation and memorandum in support is annexed as Attachment 1 hereto.

(ii) Upon the execution of this MOU, the City, by act of the Mayor, will convey the property described in the legislation to MTA NYCT by including it in the Master Lease.

(iii) At the same time the City conveys the above described property to MTA NYCT, MTA NYCT will surrender to the City, and the City will dedicate as parkland, those parcels of land in Battery Park identified on the map attached hereto as Attachment 2 as Parcel A and Parcel B and more specifically described as set forth in Attachment 3.

(iv) Upon completion of the Project, MTA NYCT will surrender to the City the temporary easements described in Section 5 of the legislation, for continued use as parkland.

B. Section 6(f). MTA has been advised by the New York State Office of Parks, Recreation and Historic Preservation (“OPRHP”) that Battery Park has received some federal funding under Section 6(f) of the federal Land and Water Conservation Fund Act (“Section 6(f)”), 16 USC Sec. 4601-8(f), and that MTA NYCT’s proposed use of land in Battery Park may be subject to certain restrictions under 6(f) regarding “conversions” of parkland for non-park uses. As part of the mutual considerations under this Agreement, the City agrees to work cooperatively with MTA, OPRHP and any other involved agency to assist MTA in either satisfying the requirements of Section 6(f) or demonstrating that MTA NYCT’s use of land in Battery Park is exempt from Section 6(f) requirements.

ARTICLE 2 - GRANT OF LICENSE

Effective upon execution of this Memorandum of Understanding, and reasonable prior notice to DPR, DPR hereby grants to the MTA permission and license to enter upon property owned, held by or under the jurisdiction of DPR, to which access is reasonably required for the Authority to perform the Project.

ARTICLE 3 - DESCRIPTION OF THE WORK

A. **The Project Work:** The Project Work consists of construction of (i) a new two-track terminal with three entrances, (ii) a new connection between the 1/9 Line at South Ferry and the N/R Line at Whitehall Street Station, and (iii) one new ADA accessible elevator.

B. **Project Schedule:** This project will be undertaken in two contract packages. MTA anticipates that the contract for the structural tunnel box will be awarded by October, 2004 (Contract #1). Included in that contract is a provision for the contractor to work in Battery Park either from Contract award through May 2005 or between September 2005 and May 2006. The balance of the project will be in the Systems and Finishes Contract ("Contract #2") estimated to be awarded in December 2005, and scheduled for completion in December 2007. The entire project for the new South Ferry Terminal is scheduled for completion by December 2007.

C. **DPR Work:** In consideration for being able to proceed with the Project Work in areas of Peter Minuit Plaza and Battery Park, MTA shall undertake to perform certain improvement work within Battery Park, as more particularly set forth below. The DPR Work shall generally include the construction of a bikeway, installation of the Town Green Oval area in accord with DPR's Master Plan, movement or replacement of identified trees, restoration of certain monuments, movement or preservation of the WTC Memorial, and appropriate sidewalk, planting and benches along Battery Place. This DPR work is indicated at a conceptual level on

the attached drawing (Attachment #4). This work will be accomplished in two phases. The tree work in Battery Park will be performed in Contract #1 in manner that is consistent with the “Study of Trees in Battery Park Affected by Tunnel Excavation” that is set forth as Attachment #5. In addition, an initial restoration of Battery Park will also be completed in Contract #1 in accordance with the attached Description of Work (Attachment #6). However, the balance of the park enhancements in accord with DPR’s Master Plan will be designed by MTA (subject to DPR approval as further described below) for inclusion in Contract #2 (whose work is scheduled to be completed by December 2007).

D. **Peter Minuit Plaza:** With respect to the restoration of Peter Minuit Plaza, MTA and DPR shall enter into a separate agreement with the New York City Economic Development Corporation (NYCEDC) in order for MTA to take over in substantial measure the scope of work previously agreed to between NYCEDC and DPR and included in the NYCEDC Ferry Terminal Contract for certain finishing work and restoration of the Plaza areas. The final scope of this work and the terms of the agreement shall be subject to review and approval by the parties.

E. DPR will submit an application to the New York City Arts Commission for approval of the open space design, paving and landscape for the DPR Work.

F. **Project Head House Structures:** MTA recognizes that the project Head House Structures should be designed in a manner that is sympathetic to their location in and adjacent to public parks. DPR shall therefore be provided opportunity to comment on the designs for the Project’s Head House Structures on State Street and in Peter Minuit Plaza prior to MTA’s approval of the preliminary designs and again prior to MTA’s approval of the final designs.

G. **Park Is Open Campaign:** MTA shall coordinate with DPR the implementation of a “Park Is Open” campaign to promote continued access and use of Battery Park. This

campaign may include the development of signage and other means acceptable to the parties to promote the continued use of Battery Park during the Project.

ARTICLE 4 - PERFORMANCE OF THE MTA PROJECT AND DPR WORK.

A. The MTA agrees to commence performance of the Project and the DPR Work (hereinafter the Project and the DPR Work are collectively referred to as the “Construction Work”) and to substantially complete same in accordance with the MTA’s schedule of construction. For purposes of this Memorandum of Understanding and Agreement, the terms “Substantial Completion” shall mean that the Construction Work has been completed to such an extent that the MTA, in the exercise of its reasonable discretion, certifies that the Station, and/or the DPR facilities may be opened and made available for public use. “Final Completion” means that all punch list items are complete and that no further work remains to be done. Substantial and Final Completion of the DPR Work shall be subject to the approval of DPR.

B. With respect to the design and construction of the bikeway, Town Green Oval and the areas of the Great Lawn disturbed by the Project, MTA shall undertake the designs required for this work, as indicated on the attached conceptual drawing (Attachment #4). With respect to the design development process, DPR shall provide reasonable qualification requirements for a landscape architecture design firm to be retained by MTA or its contractor. DPR shall be provided the opportunity to participate in the design development process and to review preliminary and final design drawings. DPR shall attend design development meetings as requested. Any comments on design drawings shall be provided by DPR within twenty-one (21) days of receipt. These designs shall be incorporated into the Construction Work and shall be subject to DPR approval.

ARTICLE 5 - MANNER OF PERFORMANCE OF CONSTRUCTION WORK

A. The DPR work shall be performed by MTA and its contractor unless DPR timely notifies MTA that DPR wishes to perform such work. MTA shall advise DPR of the timeframe in which it must make this decision and DPR shall provide MTA with timely direction. Should DPR decide to cause this work to be performed by its own forces or those of its contractor, MTA shall transfer the necessary federal funds identified in Article 15A. to DPR for such work. DPR and its contractor shall coordinate its work with MTA and its contractor and each respective contractor shall carefully fit its own work to that provided under the other contracts. All federally funded work must be done in a manner that conforms with all applicable federal requirements.

B. In the event that the DPR work is to be performed by MTA, the DPR Work and the Construction Work shall be performed by the MTA in a good and workmanlike manner, in compliance with all plans and specifications. Additionally, the manner in which the Work is performed and the labor and materials used in the Work shall be in accordance with the applicable laws of the Federal Government, the State of New York and local laws, and the applicable requirements of the various agencies and departments of the Federal Government, State of New York, City, and the MTA.

C. The MTA shall cause its Contractor to obtain all permits necessary for the Construction Work to be performed by the MTA.

D. DPR agrees to cooperate with the MTA in the execution of properly completed documents that require execution for the filing and obtaining of such permits and government approvals.

ARTICLE 6 - NOTICE TO DPR PRIOR TO COMMENCING WORK

Before the Construction Work is commenced, the MTA shall give at least five (5) business days notice to DPR's designee, Johanna Freeman, or as otherwise advised by DPR.

ARTICLE 7 - TITLE TO IMPROVEMENTS/DRAWINGS OF DPR WORK

Title to all materials purchased for installation by the MTA as part of the DPR Work shall vest in DPR upon the installation thereof. Upon Final Completion of the DPR Work, the MTA shall deliver to DPR reproducible mylar or vellum copies of all contract drawings of the DPR Work, reflecting the as-built conditions. In the event DPR elects to request as-built contract drawings on 35 mm microfilms or electronic reproductions compatible with the MTA's format, the MTA will use reasonable efforts to acquire such from the MTA's contractor.

ARTICLE 8 - MAINTENANCE OBLIGATIONS

A. **The MTA:** Upon Substantial Completion of the Project, MTA NYCT will maintain the Station, the new bus lay-up areas located adjacent to the North Island and South Island, and the crosswalk, including snow removal in the subway entrance areas.

B. **DPR:** Upon Substantial Completion of the DPR Work, DPR will maintain the DPR Work, all park areas and improvements.

ARTICLE 9 - FUNDING AND PAYMENT FOR THE WORK

A. The MTA will fund the Construction Work using Federal Funds in accordance with a grant from the Federal Transit Administration ("FTA"). In no event shall the MTA be responsible to fund DPR work beyond the scope and budget established for DPR Work set forth in Article 15 A. below.

B. In the event the DPR requests enhancements or additions to the DPR Work (that are not related to any negligence by MTA), as more particularly set forth in Article 12 hereof, this request shall be subject to MTA and FTA concurrence. Upon receipt of this concurrence, MTA shall negotiate any necessary change orders to implement this additional work, which shall be paid for by DPR pursuant to a separate agreement. Under that agreement, the MTA shall provide monthly vouchers to DPR for costs incurred for such enhancements or additional work, as evidenced by detailed invoices. Such costs shall include all expenses, including labor and materials, all overhead, profit and administrative charges, including any necessary work by the design consultants, the MTA and all contractors for the performance of such enhancements or additions. Within thirty (30) days of receipt of a monthly voucher, DPR will reimburse the MTA therefor. All invoices so submitted by the MTA shall be subject to the approval of DPR and to audit by the Comptroller of the City of New York. Following the completion of all DPR Work by the MTA, a final statement of costs associated with such enhancements or additions shall be submitted to DPR within ninety (90) days of final acceptance of the DPR Work. The final reimbursement payment to the MTA shall be made within sixty (60) days after the submission by the MTA of the final statement, subject to the final audit of the Comptroller of the City of New York.

C. With respect to the cost of the DPR Work, the MTA shall keep and retain all appropriate cost records and accounts to be available for audit by appropriate authorized representatives of DPR. The MTA further agrees that it will notify DPR in writing of the location where such cost records and accounts will be available for the purpose of said audit for a period of six years from the date of final payment by DPR.

D. In-house costs associated with the Construction Work (inclusive of any change orders that may be issued), including, but not limited to, overhead, shall be borne by each party, respectively, at no additional cost to the other parties.

ARTICLE 10 – NYS DOT WORK – BATTERY PLACE

MTA is undertaking the performance of certain work that was to have been performed by NYSDOT in and adjacent to Battery Place, including certain work on Battery Park, in accordance with the attached MOU between MTA and NYSDOT (Attachment #7). DPR represents that it has reviewed this MOU and is in agreement with the required work for Battery Park indicated therein.

ARTICLE 11 - INSPECTION, APPROVAL AND ACCEPTANCE

A. DPR and their representatives shall be afforded a full opportunity to inspect the DPR Work, as it progresses. DPR may utilize a portion of the funds identified in Article 15 B. to fund a project liaison who shall provide inspection services and be DPR's point of contact at the site.

B. The MTA shall not accept, or authorize the final acceptance of the design or construction of, any portion of the DPR Work without having obtained the prior written approval of DPR in each instance, which approval shall not be unreasonably withheld.

ARTICLE 12 - CHANGE ORDERS

(i) In the event that, after award by the MTA of a contract for the Construction Work, DPR requests enhancements or additions to the DPR Work, which would entitle the

contractor under the terms of the construction contract to change orders and additional compensation to implement such enhancements, or additions, DPR shall bear the full cost of such additional compensation.

(ii) In the event that changes in the DPR Work become necessary for any other reason, the MTA shall bear the cost thereof and shall notify the DPR of such a proposed change as soon as reasonably practicable. Except in the case of emergency, such change shall not be performed by the MTA without the prior written notification to and timely review and approval by DPR.

ARTICLE 13 - WARRANTIES

The MTA shall require its contractor(s) to warranty the Construction Work for a period not less than one year from Substantial Completion. The MTA will provide that the City and DPR are third party beneficiaries to the Construction Work warranties.

ARTICLE 14- PERFORMANCE and PAYMENT BONDS

The MTA shall require its contractor(s) to provide performance and payment bonds for the Construction Work. The MTA will require contractors to cause the City and DPR to be third party beneficiaries to said bonds.

ARTICLE 15 - PARK MITIGATION MEASURES

- A. The MTA shall undertake to perform the DPR Work as indicated in Attachment #2 hereto in consideration for the City's support of the alienation needed to perform the Project and for the use of Peter Minuit Plaza and Battery Park during the Project. The budget associated with the DPR Work is an amount not to exceed \$10,826,000, which represents

the maximum value that the MTA shall be obligated to incur for the performance of this DPR Work, subject to Article 12 and 16 hereof. This budget represents what is reasonably estimated for the performance of the DPR Work. The parties shall undertake the design development process to design to this budget. If at the conclusion of the design process, or otherwise during the Project, the budget is estimated to be insufficient for the DPR Work, the parties shall utilize good faith efforts to identify additional funds.

B. Within 90 days of the execution of this Agreement, the MTA shall make payment to the City in the amount of \$4,250,000 in consideration for the permanent surface areas that are being conveyed as a result of the alienation, for the temporary use of Peter Minuit Plaza and Battery Park needed during the performance of the Construction Work, and for use by City to purchase substitute park land if necessary to comply with any Federal requirements referred to in Paragraph 1(B) above. These funds represent the maximum amount that the MTA shall be obligated to pay the City for the use of these areas, except for any additional liability arising from Articles 16 and 23 below.

ARTICLE 16 - RESPONSIBILITY FOR THE CONSTRUCTION WORK

A. The MTA assumes ultimate responsibility for the Construction Work and for the performance of the Construction Work by its contractor(s). DPR makes no representation regarding the site or conditions of the property to be utilized for the Work. The MTA agrees that the Construction Work shall be carried on with due regard for the protection and maintenance of the property, traffic and operations of DPR, and in such a manner as to prevent damage to the property and to minimize interference with traffic or operations.

B. In connection with work in Battery Park, the MTA shall undertake a construction schedule that minimizes interference with Battery Park from May to September, and maximizes the opportunities for Park access and use to be maintained.

C. The MTA or its contractor shall repair damage, which damage is attributable to the actions of the MTA, its contractors, subcontractors, consultants and representatives, and which damage is attributable to acts of the MTA employees, and in a manner that is consistent with this Agreement. To the extent that any Construction Work is to be performed by the MTA employees, agents or servants directly, as distinguished from performance thereof through MTA contractors or consultants, references in this Agreement to the contractor(s) of the MTA, shall be deemed to mean the MTA and its designated employees performing such Work, as the context so indicates.

D. Nothing contained herein shall be deemed to impose any liability on the MTA to the extent any such bodily injury or property damage arises out of acts or omissions of (a) the City or DPR or their employees, agents or contractors, or, (b) third parties who are not engaged by the MTA as employees, contractors, subcontractors or consultants. The MTA shall be responsible only to the extent any bodily injury or property damage arises out of acts or omissions of the MTA or its representatives, employees, agents, contractors, subcontractors or consultants. Further, unless otherwise expressly agreed to in writing, as between the MTA and DPR, the MTA assumes ultimate responsibility for the Construction Work, including methods utilized, except to the extent such methods affecting the Construction Work are (i) performed by DPR or (ii) undertaken expressly as a result of directives of DPR over the MTA's written objections.

ARTICLE 17 - NO ASSIGNMENT

Each party agrees that it shall not assign, transfer, convey or otherwise dispose of this Agreement, except by operation of law, without the prior written consent of the other party.

ARTICLE 18 - WAIVER

Waiver by any part of a breach of any provision of this Agreement shall not be deemed to be a waiver of any other or subsequent breach and shall not be construed to be a modification of the terms of the Agreement unless and until the same shall be agreed to in writing by the other parties hereto and attached to the original Agreement.

ARTICLE 19 - MODIFICATION

This agreement may be modified by the parties in writing, but may not be altered or modified orally.

ARTICLE 20 - MERGER

This written Agreement contains all the terms and conditions agreed upon by the parties hereto, and no other agreement, oral or otherwise, regarding the subject matter of this Agreement, except as referred to herein, shall be deemed to exist or to bind any of the parties hereto, or to vary any of the terms contained herein.

ARTICLE 21 - EFFECTIVE DATE AND TERMINATION

This Agreement shall not be effective until it is duly executed by the parties and a fully executed original thereof has been delivered to the MTA ("Effective Date"). DPR represents that all required approvals shall have been obtained prior to the delivery of such executed

original to the MTA. Unless otherwise extended by mutual agreement of the parties, the term of the Agreement shall be from the Effective Date until the date of Construction Work is finally completed or until all obligations of the parties have been completed, whichever is later.

ARTICLE 22 - INSURANCE

A. In the case where the Work is being performed by an MTA contractor, subcontractor or consultant, before the Work is commenced, the MTA agrees to cause each such contractor, subcontractor and consultant engaged on the Construction Work to take out, and to keep in effect until said Construction Work is completed, insurance as specified below.

B. Prior to the commencement of the Construction Work, the MTA shall deliver to DPR policies or certificates of insurance indicating coverage for public liability, property damage inclusive of contractual liability coverage, naming the MTA, the MTA, the City and DPR as Additional Insured parties and which shall insure against loss and liability (a) on account of personal injury (including death) or property damage (i) resulting from or occurring by reason of, or in connection with, the performance of the Construction Work by the MTA, its contractors, subcontractors, agents or employees, or (ii) completed operations (for a period of one year after final completion,) and (b) resulting from or occurring by reason of the MTA's contractual liability pursuant to this Agreement, all with minimum limits of Five Million Dollars (\$5,000,000) per occurrence for personal injuries (including death) and One Million Dollars (\$1,000,000) per occurrence for property damage or a combined single limit of Five Million Dollars (\$5,000,000). Such policies or certificates shall not contain, or shall be endorsed to eliminate, without limitation, the exclusion of XCU risks (explosions, collapse and underground hazards), exclusions for operations within fifty feet (50) of any railroad property and liability to third party beneficiaries under contracts with public authorities.

ARTICLE 23 - INDEMNIFICATION

The MTA shall fully indemnify, defend and hold the City and DPR, their officers, employees or members, harmless for any injuries (including death) to persons including, without limitation, employees of the City and/or DPR or damage to or destruction of property, caused in whole or in part by the intentional or negligent acts of the MTA, its employees or agents, occurring by reason of or in connection with the Construction Work, except to the extent such may be caused by the intentional or negligent acts of the City, and/or DPR, their employees, contractors, subcontractors, consultants or agents.

ARTICLE 24 - MISCELLANEOUS

A. It is specifically understood and agreed by and between the parties shall be deemed to have drawn this Agreement in order to avoid any negative inference by any court as against the preparer of the document.

B. This Agreement shall be binding upon the respective parties, their heirs, assigns, executors, administrators and successors-in-interest to their property.

C. This Agreement shall be governed and construed in accordance with the laws of the State of New York. The parties agree that any and all claims asserted or arising hereunder or related hereto shall be heard and determined either in the courts of the United States located in New York City ("Federal Courts") or in the courts of the State of New York ("New York State Courts") located in New York County.

D. The signatories below, on behalf of the MTA, the MTA, the City, DPR, hereby represent that they have full authority to execute, and enter into this Agreement and to bind the MTA, the MTA, the City, and DPR respectively, to its terms.

E. Any and all notices under this Agreement, if to the MTA shall be delivered by hand to Mysore L. Nagaraja, President, MTA Capital Construction, 2 Broadway, 8th floor, New York, NY 10004, with copies by to Veronique Hakim, General Counsel, MTA Capital Construction, 2 Broadway, 8th floor, New York, NY 10004 and if to DPR, with copies by hand and by fax to Joshua Laird, Chief of Planning, DPR, The Arsenal, Central Park, 830 Fifth Avenue, New York, NY 10021 (212) 360-3402), with copies by hand and by fax to Alessandro G. Olivieri, General Counsel, DPR, The Arsenal, Central Park, 830 Fifth Avenue, New York, NY 10021 (212) 360-1373).

F. The parties agree that none of the terms and provisions of this Agreement shall be deemed to have intended to constitute a benefit of any kind onto any third parties, except the City and the MTA respectively.

G. No commissioner, member, officer or employee of the MTA, the City, or DPR shall be liable personally under or by reason of this Agreement, or any of its articles, covenants or provisions, nor shall any commissioner, member, officer or employee of the MTA, the City, or DPR be personally liable, or be sued individually for damages on account of any breach of this Agreement.

IN WITNESS WHEREOF, THE MTA AND DPR have caused this Agreement to be signed by their duly authorized officers on the day and year first above written.

Approval as to Form

Veronique Hakim

MTA CC General Counsel

Approval as to Form

Steve Stein Cash III

Corporation Counsel AUG 25 2004

MTA CAPITAL CONSTRUCTION

By: Mysore L. Nagaraja 8/26/04

Mysore L. Nagaraja, President

DEPARTMENT OF PARKS AND
RECREATION OF THE CITY OF
NEW YORK

By: Adrián Benepe 8/25/2004

NAME & TITLE

Adrián Benepe, Commissioner