Resolution No.: 18-1037

Introduced: January 16, 2018
Adopted: February 27, 2018

COUNTY COUNCIL FOR MONTGOMERY COUNTY MARYLAND

Lead Sponsor: Council President at the request of the County Executive

SUBJECT: Grant of franchise to Bethesda Avenue, LLC (Ourisman Honda) to use the public right-of-way

Background

- 1. Sections 49-20 and 49-21 of the County Code provide that the County Council may grant a franchise for use of the public right-of-way after:
 - a) the franchise applicant publishes notice of the application once a week for three consecutive weeks in a newspaper of general circulation in the County;
 - b) the County Executive investigates the value of the franchise and the adequacy of the proposed compensation the applicant will pay to the County;
 - c) the Executive holds a hearing on the application if any taxpayer or affected property owner objects to the franchise within 10 days after the last notice of the application is published;
 - d) the Executive makes a written recommendation to the Council about the franchise, including findings about the value of the franchise, any response to objections that have been raised, and any other relevant issues; and
 - e) the Council decides that the franchise is expedient and proper.
- 2. On August 17, 24, and 31, 2017, Bethesda Avenue, LLC published notice of its application for a franchise to use the public right-of-way. The Executive received comments objecting to the proposed franchise agreement. A public hearing was held on September 12, 2017.
- 3. January 8, 2018, the Council received the Executive's recommendation to grant a franchise to Bethesda Avenue, LLC and a proposed franchise agreement.
- 4. On February 6, 2018, the Council held a public hearing on the proposed franchise agreement.

Page 2 Resolution No.: 18-1037

4. On February 6, 2018, the Council held a public hearing on the proposed franchise agreement.

Action

The County Council for Montgomery County Maryland approves the following resolution:

The County Council finds that granting a franchise to Bethesda Avenue, LLC for use of the public right-of-way is expedient and proper. The Council grants the franchise under the terms of the attached franchise agreement.

This is a correct copy of Council action.

Megan Davey Limarzi, Eq.

Clerk of the Council

FRANCHISE AGREEMENT

The County Council for Montgomery County, Maryland, having approved by Resolution
No. 18-1037 dated the 27th day of February , 2018, a Franchise to construct and
maintain five (5) vertical support columns at and below the surface of the Access Easement
(hereafter defined), and a portion of a private parking garage and canopy extending into the air
rights above the surface of the Access Easement, this Franchise Agreement (the "Agreement"),
is made as of this 27th day of February, 2018, by and between Montgomery
County, Maryland, a body corporate and politic of the State of Maryland (the "County"), and
Bethesda Avenue, LLC, a Maryland limited liability company (the "Franchisee"). The County
and Franchisee are hereinafter collectively referred to as the "Parties".

RECITALS

WHEREAS, Montgomery County acquired the 6.45 mile Maryland portion of the railroad line known as the Georgetown Branch (the "Public Right-of-Way") from the Metropolitan Southern Railroad Company, the Washington and Western Maryland Railroad Company and CSX Transportation, Inc., successor by Articles of Merger to the Chesapeake and Ohio Railroad Company and the Baltimore and Ohio Railroad Company with Interstate Commerce Commission approval reflected in a Certificate of Interim Trail Use for interim trail use/railbanking under 16 U.S.C. §1247(d) (the "National Trails System Act").

WHEREAS, the Public Right-of-Way was acquired by the County for the express purpose of constructing energy efficient transportation in the form of light rail and a hiker and biker trail.

WHEREAS, pursuant to the Certificate of Interim Trail Use, the interim trail use/rail banking for the Maryland portion of the Georgetown Branch line owned by the County is subject to the future restoration of rail service.

WHEREAS, the Public Right-of-Way is improved with the Capital Crescent Trail, and a light rail project known as the "Purple Line" is underway that will co-locate with the Capital Crescent Trail for that portion of the Georgetown Branch Line easterly from the Bethesda Metro station to Silver Spring and beyond.

WHEREAS, Franchisee owns a parcel of land located at 4800 Bethesda Avenue ("Franchisee Land") upon which it operates a car dealership which abuts a portion of the Public Right-of-Way as shown on Exhibit 1.

WHEREAS, the parties share a reciprocal 20-foot wide access easement that traverses the length of the Franchisee's property at 4800 Bethesda Avenue and the abutting Public Right-of-Way, with one-half (10 feet) of the access easement located on and part of the Public Right-of-Way, and one-half (10 feet) located adjacent thereto further to the west and part of the 4800 Bethesda Avenue parcel as shown on Exhibit 1.

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WHEREAS, Montgomery County Code Section 49-21 authorizes the Council to grant a franchise for the location of a permanent structure within a public right-of-way.

WHEREAS, Franchisee wishes to construct, install, operate, and maintain five (5) vertical support columns at and below the surface of the Access Easement at fixed locations, and a portion of a private parking garage beginning approximately nineteen feet (19') above the surface of the Access Easement into the air rights above the surface of the Access Easement, along with a canopy beginning approximately fourteen feet (14') above the surface of the Access Easement. The support columns and air rights occupation areas are as shown on Exhibit 2 (the "Franchise Areas").

WHEREAS, in connection with the operation of its car dealership, Franchisee has made a request to the County for the grant of a franchise in the Franchise Areas to construct, install, operate, and maintain the five (5) vertical support columns, a portion of a private parking garage and a canopy pursuant to Chapter 49 of the Montgomery County Code 1994, as amended.

WHEREAS, Franchisee has caused its franchise request to be published in the Montgomery County Sentinel once a week for three consecutive weeks (August 17, 2017; August 24, 2017; August 31, 2017) in accordance with the provisions of Montgomery County Code section 49-20(a).

WHEREAS, the County Executive or designee has investigated the value of the franchise in accordance with the provisions of Montgomery County Code section 49-20(b), and the adequacy of the compensation proposed for the use of the Franchise Areas. The County Executive has found that the proposed consideration is sufficient to justify the grant of the requested franchise.

WHEREAS, on September 12, 2017, the County Executive or designee conducted a public hearing on the Request for Franchise and has forwarded written recommendations to the County Executive along with findings in accordance with Montgomery County Code section 49-20(d) and which the County Executive transmitted to the Montgomery County Council.

WH	EREAS, on	February 27	, 2018, the Montgomery County Council by Resolution
No.	18-1037	authorize	zed the County, pursuant to the terms and conditions of the
Reso	lution, to enter in	nto this Franchis	ise Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, this Franchise Agreement is entered into by and between the parties subject to the following terms and conditions:

- **1. GENERAL.** The foregoing Recitals are incorporated into this agreement and attachments are incorporated herein as if fully set out.
- 2. **DEFINITIONS.**

For the purposes of this Agreement, the following words, terms, phrases, and their derivations shall have the meanings given herein. The word "shall" is always mandatory.

- **2.1** "Access Easement" means that twenty foot wide reciprocal access easement shown on Exhibit 1 and including the following two (2) areas: 1) the westernmost ten feet (10') of that portion of the Public Right-of-Way identified as Parcel B that was reserved unto the Grantor in the Special (Limited) Warranty Deed dated March 27, 1986 and recorded among the Land Records of Montgomery County, Maryland at Liber 7221, Folio 346, and 2) the abutting easterly ten feet (10') of Franchisee's Land.
- **2.2** "Agency" means any governmental agency or quasi-governmental agency, including the Surface Transportation Board ("STB").
- **2.3** "CAO" means the Chief Administrative Officer of the County or authorized designee.
- **2.4** "Capital Crescent Trail" means the hiker/biker trail located on the Public Right-of-Way and for purposes of this Agreement refers only to that trail and related improvements currently or in the future located within the Public Right-of-Way.
- 2.5 "Certificate of Interim Trail Use or CITU" means the Interstate Commerce Commission certificate and decision of interim trail use, Docket No. AB-19 (Sub–No. 112), decided on December 12, 1988 (1988 WL 225133), which governs the Montgomery County, Maryland portion of the Georgetown Branch Railroad between milepost 0.23 (Valuation Station 12+00) and milepost 6.68 (Valuation Station 375+71.2), a distance of 6.45 miles.
 - **2.6** "County" means Montgomery County, Maryland.
- **2.7** "Department of Parks" means the Maryland National Capital Park and Planning Commission, Montgomery County Department of Parks.
 - **2.8** "Effective Date" of this Agreement means _____ February 27 ______, 2018.
- 2.9 "Franchise Areas" means i) the area occupied by the five (5) vertical support columns at and below the surface of the Access Easement at fixed locations and connecting to the Garage structure, and the Garage's occupancy of a portion of air rights beginning approximately nineteen feet (19') above the surface of the Access Easement and consisting of three levels of a horizontal plane of approximately 1,103 square feet as shown on Exhibit 2; and ii) the airspace within the Access Easement to be occupied by a canopy for the Ourisman Honda dealership building beginning approximately fourteen feet (14') above the surface of the Access Easement and consisting of a horizontal plane of approximately 407 square feet, as shown on Exhibit 2.
- **2.10** "Franchisee" means Bethesda Avenue, LLC, a Maryland limited liability company, it successors and assigns.

- **2.11** "Franchisee Land" means that property shown on Exhibit 1 as Franchisee's property at 4800 Bethesda Avenue and upon which it operates a car dealership.
- **2.12** "Franchise Improvements" means only: the five (5) vertical support columns; the approximately 1,103 square foot floor plate portion of the Garage, its three deck structures located within the Franchise Areas beginning approximately nineteen feet (19') above and clear of the surface of the Access Easement, and the Garage screening improvements; and the canopy for the Ourisman Honda dealership building located within the Franchise Areas as shown on Exhibit 2, beginning approximately fourteen feet (14') above and clear of the surface of the Access Easement and occupying an approximately 407 square foot horizontal plane. Franchise Improvements includes no other improvements of any kind.
- **2.13** "Garage" means the portion of the private parking structure within the Access Easement as shown on Exhibit 4. Garage includes all decorative screening, fencing, and ornamentation to be made substantially in accordance with Exhibit 4, as well as the proposed canopy for the Ourisman Honda dealership building located within the Franchise Areas as shown on Exhibit 4.
- **2.14** "Law" means any and all judicial decision, statute, constitution, ordinance, resolution, regulation, rule, tariff, administrative order, certificate, order, permits, or other requirement of the Federal Government, State, County, or other Agency having exclusive, joint or several jurisdiction over the parties to this Agreement, in effect either on the Effective Date or at any time during the presence of the Franchise Improvements in the Franchise Areas.
- **2.15** "Revertible Relocated Access Easement" means that portion of the Franchisee Land as shown on Exhibit 3 which is to be used by the Parties for temporary surface vehicular and pedestrian ingress and egress consistent with the terms of the Access Easement for the duration of this Agreement. The Revertible Relocated Access Easement must retain a total width of twenty feet (20') and shall provide an additional 1,653 square feet of Franchisee's Land to be used as the Revertible Relocated Access Easement.
- **2.16** "Person" means an individual, a corporation, a limited liability company, a general or limited partnership, a sole proprietorship, a joint venture, a business trust, and any other form of business association or organization of any kind.
- **2.17** "Public Plaza" means that amenity plaza improvements and easement for use as a public amenity to be located on the Franchisee Land and the Access Easement, as shown on Exhibit 3.
- **2.18** "Subject Public Right-of-Way" means the property identified as Parcel B that was reserved unto the Grantor in the Special (Limited) Warranty Deed dated March 27, 1986 and recorded among the Land Records of Montgomery County, Maryland at Liber 7221, Folio 346 and which includes a 10-foot portion of the Access Easement as described in said Special (Limited) Warranty Deed.

- 2.19 "Trail Improvement Plan" means all improvements and amenities to be provided by Franchisee after the execution of this Agreement pursuant to Section 7 and Exhibit 6 to enhance the appearance, safety, function, feel, use and operation of the Capital Crescent Trail, including but not limited to the shoulders on either side of the Capital Crescent Trail, resurfacing and/or restoration of the pavement of the Capital Crescent Trail, enhanced landscaping, fencing, bench relocations, lighting, and signage which it must maintain in good condition throughout the term of this Agreement, all substantially as shown on Exhibit 3. Once constructed and installed, the Trail Improvements (except for architectural panels on the Garage and the fencing separating the Capital Crescent Trail from Ourisman Honda's operations) shall become and remain the property of the County, and Franchisee shall have no right or title to any of them except as set forth in this Agreement.
- **2.20** "Work" means the design, construction, regulatory approvals, and all work or approvals necessary or incidental to complete and maintain i) the Revertible Relocated Access Easement, ii) the Public Plaza, iii) the Trail Improvement Plan, and iv) all decorative screening, fencing, lighting and ornamentation for the Garage to be made substantially in accordance with Exhibit 4. Work includes the obligations described in Sections 5 and 7.

3. TERM.

The useful life of the Franchise Improvements, including ordinary maintenance and capital repairs, is at least ninety-five (95) years. Accordingly, this Agreement shall commence on the Effective Date and shall be for an initial term of ninety-five (95) years from the Effective Date, unless the Agreement is terminated earlier because the Public Right-of-Way is reclaimed for the restoration of rail service under the CITU or the Agreement is earlier terminated by either party in accordance with the provisions herein.

4. SCOPE OF FRANCHISE.

Subject to the provisions of the CITU, the County hereby grants to Franchisee the right to construct, reconstruct, install, operate, maintain, locate, remove, reattach, reinstall, and replace the Franchise Improvements in the Franchise Areas in accordance with and subject to all applicable Laws and Agency requirements. This franchise is in connection with Franchisee's operation of a car dealership on the Franchisee Land and for no other purpose whatsoever. The rights herein granted to Franchisee shall be exercised at Franchisee's sole cost, risk and expense, and are subject to the prior and continuing rights of the County under applicable Laws to use any and all parts of the Subject Public Right-of-Way and the Access Easement excluding only the actual Franchise Improvements which are subject to the terms of this Agreement. Nothing in this Agreement shall be deemed to grant, convey, create, vest, relinquish or otherwise modify interests in real property in land to Franchisee, including any fee, leasehold interest, or easement. Franchisee may not use the Franchise Areas for any other purpose whatsoever. Franchisee must provide at least thirty (30) days advance written notice to the County and to the Department of Parks prior to performing any work on or within the Franchise Areas, and shall take such precautions as the County or the Department of Parks determine to be reasonably necessary to protect public safety and the property of the County and/or the Department of Parks in the Subject Public Right-of-Way during the performance of any such work.

- **4.2** Nothing herein is in limitation, waiver, concession or derogation of any rights or powers of the County. County expressly reserves the right and duty at all times to exercise full municipal control and regulation in respect to all matters connected with the Subject Public Right-of-Way and connected with the franchise not inconsistent with its terms in accordance with Montgomery County Code Section 49-22.
- 4.3 Franchisee must indemnify and hold the County and the Department of Parks harmless from any claims, costs or expenses of any nature whether arising under the CITU, Franchisee's acts or failures to act (including acts or failures to act by any of Franchisee's employees, invitees, contractors or agents), applicable Law or any other reason arising out of, or relating to the Franchise Improvements or Franchisee's use of the Franchise Areas. Franchisee's indemnification and hold harmless of the County and the Department of Parks includes any legal fees or costs arising out of or related to any legal action or threat of legal action by reason of, arising out of, or relating to the Franchise Improvements, Franchisee's use of the Franchise Areas, and Franchisee's exercise of any right under this Franchise Agreement.
- **4.4** Franchisee must, continually and at all times, maintain the Franchise Improvements and Franchise Areas in good and safe condition and take all steps necessary to ensure that the placement, use and operation of the Franchise Improvements do not encroach onto the Subject Public Right-of-Way except as expressly allowed by this Agreement. Franchisee may not remove or modify the screening of the Garage, fencing, or ornamenation without the County's written consent under this Agreement which must not be unreasonably withheld, denied or delayed by the County.
- 4.5 Except as permitted by applicable Laws or this Agreement, in the performance and exercise of its rights and obligations under this Agreement, Franchisee must not interfere in any manner with the existence and operation of any and all public and private rights-of-way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electric and telephone wires, electroliers, cable television, and other telecommunications, utility, and County or municipal property without the express written approval of the owner or owners of each affected property.
- **4.6** Franchisee must comply with all applicable Laws in the exercise and performance of its rights and obligations under this Agreement. Franchisee hereby acknowledges that the rights granted by this Agreement are subject to the police powers of the County.

5. COMPENSATION AND OTHER SERVICES.

5.1 As compensation for the grant of the franchise and authorization to locate the Franchise Improvements in the Franchise Areas in accordance with this Agreement, Franchisee agrees to provide the following in-kind compensation which has an approximate aggregate cost and value in excess of \$1,405,000 plus the annual maintenance costs to be assumed by Franchisee under Section 5.1.9 of this Agreement and Exhibit 5; plus (a) the additional encumbrances of Franchisee Land in connection with the Public Plaza and the Revertible Relocated Access Easement; (b) the benefit of enhanced public safety due to the relocated

entrance to the Franchisee Land and the Trail Improvements; and (c) the value of the Quitclaim of any interest claimed by Franchisee in the underlying fee simple title to the Subject Public Right-of-Way exluding however that portion of the Access Easement within the Subject Public Right-of-Way:

- **5.1.1** Franchisee must provide and continuously maintain the Revertible Relocated Access Easement which includes an additional 1,653 square feet of Franchise Land for reciprocal access as provided in the deed dated March 27, 1986 and recorded in the Land Records for Montgomery County in Liber 7221 at Folio 346.
- **5.1.2** Franchisee must at its sole cost and expense construct the Revertible Relocated Access Easement substantially as shown on Exhibit 4.
- **5.1.3** Franchisee at its sole cost and expense must relocate the access to the Franchisee Land substantially as shown on Exhibit 4 to reduce conflicts between Capital Crescent Trail ingress and egress and vehicular entry to the Franchisee Land.
- **5.1.4** Franchisee at its sole cost and expense must provide a public use easement for the duration of this Agreement for the additional 1,304 square foot portion of the Public Plaza on Franchisee Land (570 square feet of the Access Easement, and 734 square feet of Franchisee's Land other than the Access Easement) and must, at its sole cost and expense construct and throughout the term of this Agreement maintain in good condition, appearance, functionality, repair (including replacement, as necessary) and cleanliness the approximately 2,236 square foot Public Plaza substantially as shown on Exhibit 4 including all site work, furnishing, signage, landscaping and all work and improvements necessary for the completed Public Plaza. Any changes to the Public Plaza, including improvements thereon, unless installed by the County, must first be approved in writing by the County.
- **5.1.5** Franchisee at its sole cost and expense must construct, and throughout the term of this Agreement maintain in good condition, repair and cleanliness, the decorative fencing and gate to the Subject Public Right-of-Way substantially as shown on Exhibit 4. If a lock is placed or replaced on the gate, Franchisee must promptly provide two sets of keys to any such lock to both the County and the Department of Parks. Franchisee may not remove or modify the decorative fencing and gate without the County's written consent under this Agreement, which must not be unreasonably withheld, denied or delayed by the County.
- **5.1.6** Franchisee at its sole cost and expense must construct and throughout the term of this Agreement maintain in good condition, repair and cleanliness decorative screening on the Garage, and must treat the exterior of the Garage substantially as shown on Exhibit 4. Franchisee may not remove or modify the screening of the Garage without the County's written consent under this Agreement which must not be unreasonably withheld, denied or delayed by the County.

- **5.1.7** Franchisee at its sole cost and expense must design, permit, construct and maintain the trail improvements in accordance with the Trail Improvement Plan for the Term of this Agreement. Nothing herein shall limit the right of the County or the Department of Parks to add to, modify, replace, or change any public improvements within the Subject Public Right-of-Way.
- **5.1.8** Franchisee shall release and convey in fee simple to the County by Quitclaim Deed any and all interest that it claims to all but the westerly ten feet of the Subject Public Right-of-Way, saving and excepting all building density (FAR) development rights and all rights of access granted by Deed dated March 27, 1986 and recorded in the Land Records of Montgomery County in Liber 7221 at Folio 346.
- **5.1.9** Franchisee agrees to perform maintenance of the Capital Crescent Trail as improved per the Trail Improvement Plan and of the Public Plaza in accordance with Exhibit 5 during the Term of this Agreement.

6. EARLY TERMINATION, REMOVAL OF FRANCHISEE IMPROVEMENTS AND RESTORATION OF FRANCHISE AREAS.

6.1 Franchisee understands, acknowledges and agrees that the County may require Franchisee to remove the Franchise Improvements from the Franchise Areas, and the County may terminate this Agreement at any time, if the Franchise Areas are included in a project by the County or an Agency for use for rail or similar mass transit service of any nature. "Included in a project" means that the project has been included in the capital budget for the County or Agency with planning funds and preliminary construction funding budgeted. The County agrees to provide the Franchisee with a minimum of 180-days advance written notice of the requirement to remove the Franchise Improvements, and restore the Franchise Areas to a good clean condition, and of the termination of the Agreement.

If the County exercises its right to require the Franchisee to remove the Franchise Improvements from the Franchise Areas, Franchisee agrees that it has no claim for compensation due to loss of property, severance, value or any other matter related to the exercise of such right and that it shall promptly seek demolition, alteration and other applicable permits to remove the Franchise Improvements and restore the Franchise Areas, and upon the request of the County, restore the Access Easement. Nothing herein is construed to provide the County or any Agency with the right to take any of the Franchisee's Land for public use without just compensation, excepting any rights of access possessed by the County pursuant to the Access Easement. Franchisee must duly and diligently commence and prosecute to completion the removal of the Franchise Improvements and the restoration of the Franchise Areas. In the event that Franchisee fails to remove the Franchise Improvements in whole or in part, or to restore the Franchise Areas after written notice to Franchisee, the County may do so at Franchisee's cost and expense and all costs incurred in relation to, or arising out of such removal and restoration of the Franchise Areas shall be a lien against the Franchisee Land and improvements thereon and collected in the same manner as a tax lien.

- 6.2 In the event any part of the Franchise Improvements are abandoned by not being placed in service for a period-of one hundred and eighty (180) days or more, Franchisee promptly must notify the County, and Franchisee must, at Franchisee's sole cost and expense, promptly remove the abandoned part of the Franchise Improvements and restore the Franchise Areas to good condition. If Franchisee fails to notify or to remove any part of the Franchise Improvements or restore the Franchise Areas as required by the County under this paragraph, after written notice to Franchisee the County shall be entitled to remove any part of the Franchise Improvements and restore the Franchise Areas to good condition at Franchisee's sole cost and expense.
- 6.3 Franchisee must not directly or indirectly, on its own or by actions or failures to act of any of Franchisee's employees, officers, agents, contractors or invitees, cause, tolerate or allow any damage to the Subject Public Right-of-Way by reason of the construction, reconstruction, placement, presence, maintenance, use or removal of the Franchise Improvements or the Franchise Areas or restoration of the Franchise Areas. Franchisee must hold the County and the Department of Parks harmless from and against any and all claims, liabilities, costs, damages, expenses of repair or other expense related to any damage to the Subject Public Right-of-Way arising out of or related to the construction, reconstruction, placement, presence, maintenance, use or removal of the Franchise Improvements or the Franchise Areas or restoration of the Franchise Areas.

Franchisee must promptly pay the County and/or the Department of Parks for any costs or expenses either incurs due to violation of this Section 6 and such costs or expenses shall, beginning 30 days following request for payment, accrue interest at the then current rate for unpaid taxes and all such costs shall be a lien against Franchisee's Land and improvements thereon in the same manner as a tax lien.

7. DESIGN, CONSTRUCTION, CONSTRUCTION PERMIT AND SECURITY DEPOSIT; STOP WORK ORDER RELEASE.

- **7.1** Franchisee must complete the design, permitting and construction of the Work in accordance with the schedule set forth in Exhibit 6 attached. Franchisee must obtain all applicable permits and licenses in connection with the construction, reconstruction, installation, location, removal, reattachment, or reinstallation of the Franchise Improvements and the Work. Franchisee shall perform such construction work as required by the permits and this Agreement and in accordance with all applicable Laws, and in a good workmanlike manner.
- 7.2 Franchisee must deposit or file with the County a cash security deposit, a surety bond acceptable to the County Attorney, or irrevocable letter of credit acceptable to the County Attorney within thirty (30) days of the Effective Date, to secure all costs of completion of the Work. If Franchisee fails to complete the Work within one year after the issuance of all necessary Agency approvals for the Work, then the County may proceed to immediately withdraw the amount thereof or proceed against the surety bond or the letter of credit and apply such funds to completion of the Work. In addition, the Term of this Agreement shall expire and Franchisee shall be required to promptly remove all Franchise Improvements and restore the Franchise Areas in accordance with Section 11.1. Such action by the County is in addition to

any other remedy provided to the County by this Agreement or the Laws. In the event the Franchise Agreement is terminated or revoked for cause by the County, the security fund shall become the property of the County.

7.3 Promptly upon approval of this Agreement by the County, its execution by the Parties, the posting of the bond described in Section 7.2, and the Department of Permitting Services' approval of any requested or required revisions to plans for building permits for the construction of the Garage, the County shall remove the stop work order dated November 17, 2016 for permit #714813.

8. INDEMNIFICATION AND WAIVER.

- **8.1** Franchisee agrees at its sole cost and expense to indemnify, protect, defend (with counsel acceptable to the County) and hold harmless the County, the county executive, county council members, Maryland -National Capital Park and Planning Commission, and their respective officers, employees, and agents, from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorney's fees and costs of defense (collectively, the "Losses") arising, directly or indirectly, in whole or in part, out of the activities, Franchise Improvements and exercise of rights hereunder by Franchisee, its officers, employees, agents, consultants, invitees, attorneys, and contractors, described in this Agreement, except to the extent arising from or caused by the gross negligence or willful misconduct of the County, the county executive, county council members, Maryland-National Capital Park and Planning Commission, and their respective officers, officers, employees, agents, or contractors.
- **8.2** The waiver by either party of any breach or violation of any provision of this Agreement shall not be deemed to be a waiver or a continuing waiver by of any subsequent breach or violation of the same or any other provision of this Agreement.
- **8.3** Franchisee waives any and all claims, demands, causes of action, and rights it may assert against the County by reason of any stop work order issued by the County prior to the date of this Agreement and on account of any loss, damage, or injury to the Franchise Improvements caused by or arising from the installation, maintenance, replacement, or relocation of any County-owned facility in the Subject Public Right-of-Way (except to the extent caused by or arising from the gross negligence or willful misconduct of the County), or an Act of God, an event or occurrence which is beyond the reasonable control of the County, a power outage, or a lightning strike. Nothing herein shall be construed to waive the County's governmental immunity.

9. INSURANCE.

9.1 Franchisee must obtain and maintain at all times during the term of this Agreement comprehensive general liability insurance and comprehensive automotive liability insurance protecting Franchisee in an amount of not less than two million dollars (\$2,000,000)

(including umbrella or excess coverage) per occurrence (combined single limit), including bodily injury and property damage, and not less than two million dollars (\$2,000,000) (including umbrella or excess coverage) aggregate, for each personal injury, products-completed operations, and each accident. Such insurance must name the County, the County Executive, County councilmembers, Maryland National Capital Park and Planning Commission, and their respective officers, employees, agents, and contractors as additional insureds for any liability arising out of Franchisee's performance of work under this Agreement, or suitable additional- insured endorsement acceptable to the County. Coverage must be provided in accordance with the limits specified and the provisions indicated herein. Claims-made policies are not acceptable. Such insurance must not be canceled or materially altered to reduce coverage until the County has received at least thirty (30) days advance written notice of such cancellation or change. Franchisee shall be responsible for notifying the County of such change or cancellation.

- **9.2** Franchisee, within thirty (30) days of the Effective Date of this Agreement, must file the required original certificate(s) of insurance with endorsements with the County, subject to the County's prior approval, which must clearly state all of the following:
 - **9.2.1** Policy number; name of insurance company; name, address, and telephone number of the agent or authorized representative; name, address, and telephone number of insured; project name and address; policy expiration date; and specific coverage amounts. Each policy of insurance required by this Agreement must be issued by a responsible insurance company qualified and authorized to do business in the State of Maryland.
 - **9.2.2** That thirty (30) days prior written notice to the County is required for any change or cancellation to the insurance policy.
 - **9.2.3** Franchisee's insurance is primary to any other valid or collectible insurance that the County may possess, including any self-insured retentions the County may have, and any other insurance the County does possess must be considered excess insurance only and must not be required to contribute with this insurance.

The certificate(s) of insurance with endorsements and notices, must be mailed to:

Chief Administrative Officer Montgomery County, Maryland Executive Office Building 101 Monroe Street Rockville, Maryland 20850

Franchisee must annually by December 31 of each year throughout the Term provide the County with current Certificates of Insurance from its insurer reflecting the above coverage.

- **9.3** Franchisee must obtain and maintain at all times during the term of this Agreement statutory workers' compensation and employer's liability insurance in an amount not less than five hundred thousand dollars (\$500,000) or such other amounts required by Maryland law, and furnish the County with a certificate showing proof of such coverage.
- **9.4** Any deductibles or self-insured retentions must be stated on the certificate(s) of insurance, which must be sent to and approved by the County prior to the execution of this Agreement.

10. NOTICES.

All notices which must or may be given pursuant to this Agreement must be in writing and delivered personally or transmitted by means of prepaid overnight delivery service, as follows:

County: Chief Administrative Officer

Executive Office Building

101 Monroe Street

Rockville, Maryland 20850

With copies to: County Attorney

Executive Office Building

101 Monroe Street

Rockville, Maryland 20850

And Director

Department of Transportation Executive Office Building

101 Monroe Street

Rockville, Maryland 20850

Franchisee: Bethesda Avenue, LLC

4800 Bethesda Avenue Bethesda, MD 20814 Attn: John Ourisman

With a copy to: Robert G. Brewer, Jr.

Lerch, Early & Brewer

7600 Wisconsin Avenue, Suite 700

Bethesda, MD 20814

Notices shall be deemed given upon receipt in the case of personal delivery, or the next day in the case of overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party in the manner set forth above.

11. TERMINATION AND DEFAULT.

- 11.1 In addition to the early termination provided in Section 6, this Agreement may be terminated by either party upon ninety (90) days' prior written notice to the other party upon a default of any material covenant or term hereof by the other party, which default is not cured within thirty (30) days of receipt of written notice of default (or, if such default is not curable within thirty (30) days, if the defaulting party fails to commence such cure within thirty (30) days or thereafter fails to thereafter diligently prosecute such cure to completion), provided that the grace period for any monetary default is ten (10) business days from receipt of notice.
- 11.2 The County reserves the right to revoke the Franchise, subject to reasonable notice and the opportunity to cure as set forth in Section 11.1 for a material breach of the Franchise, including, but not limited to the following: i) failure to comply with the provisions of the Laws and this Agreement, and ii) use of the Subject Public Right-of-Way in violation of this Agreement.
- written notice without cause. Upon such termination, Franchisee shall promptly remove the Franchise Improvements including but not limited to the Garage and the canopy and may, at its discretion, remove the Public Plaza, abandon the Revertible Relocated Access Easement and restore the driveway entrance existing as of the date of this Agreement (subject to the issuance of applicable permits and governmental approvals). Upon such termination, and upon the request of the County, Franchisee must also restore the Access Easement at its sole cost and expense. Franchisee's maintenance and insurance obligations shall cease as of the later of effective termination date or the completion of the removal of the Franchisee Improvements and restoration of the property to a good clean condition, and if the Revertible Relocated Access Easement is abandoned, the complete restoration of the full Access Easement to a good clean condition.
- 11.4 Each party retains all of its rights to enforce this Agreement. The County reserves the right to seek injunctive relief, mandamus, or any other appropriate relief as may be necessary to enforce or correct a violation of the provisions of the Law or this Agreement.

13

12. MISCELLANEOUS PROVISIONS.

- 12.1 Franchisee may not transfer or assign this Agreement or any part thereof without the express prior written consent of the County. If the Franchisee conveys the Franchisee Land and the Franchisee Improvements continue to be used in connection with the car dealership on Franchisee's Land, the County agrees that its consent may not be unreasonably withheld, conditioned, or delayed, provided that any such transferee assumes and acknowledges the obligations under this Franchise Agreement in writing acceptable to the County. Franchisee must give the County prior written notice of any proposed assignment or transfer for which the County's consent is required hereunder. The County Council must give Franchisee written approval or disapproval of any such proposed assignment or transfer within a reasonable time period not to exceed ninety (90) days after the Council receives Franchisee's request therefor, and the County Council's failure to approve or disapprove any such request within such ninety (90) day period shall be deemed an approval. Franchisee must provide all information and documents reasonably requested by the County relating to the assignment or transfer.
- 12.2 This Agreement contains the entire understanding between the parties with respect to the subject matter herein and supersedes all prior understandings and agreements, whether written or oral. There are no representations, agreements or understandings (whether oral or written) between or among the parties relating to the subject matter of this Agreement which are not fully expressed herein.
- **12.3** This Agreement may not be amended except pursuant to a written instrument signed by both parties.
- 12.4 This Agreement shall be governed by and construed in accordance with the laws of the State of Maryland, without reference to its conflicts of law principles. In the event that suit is brought by a party to this Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of Maryland, or in the United States District Court of Maryland, Southern Division.
- 12.5 All exhibits referred to in this Agreement and any addenda, attachments, and schedules which may, from time to time, be referred to in any duly executed amendment to this Agreement are by such reference incorporated in this Agreement and shall be deemed a part of this Agreement.
 - **12.6** This Agreement is binding upon the successors and assigns of the parties hereto.

WITNESS: MONTGOMERY COUNTY, MARYLAND

14

Megan Davey Limarzi
Clerk of the Council Hans Riemer, President Montgomery County Council The Provisions of this Agreement are agreed to and hereby accepted.

WITNESS:	BETHESDA AVENUE, LLC
	By: Mulle Cousant
	THE THE WATER

Combined Exhibit 1 and Exhibit 2

Exhibit 1 and Exhibit 2 are combined into a single page

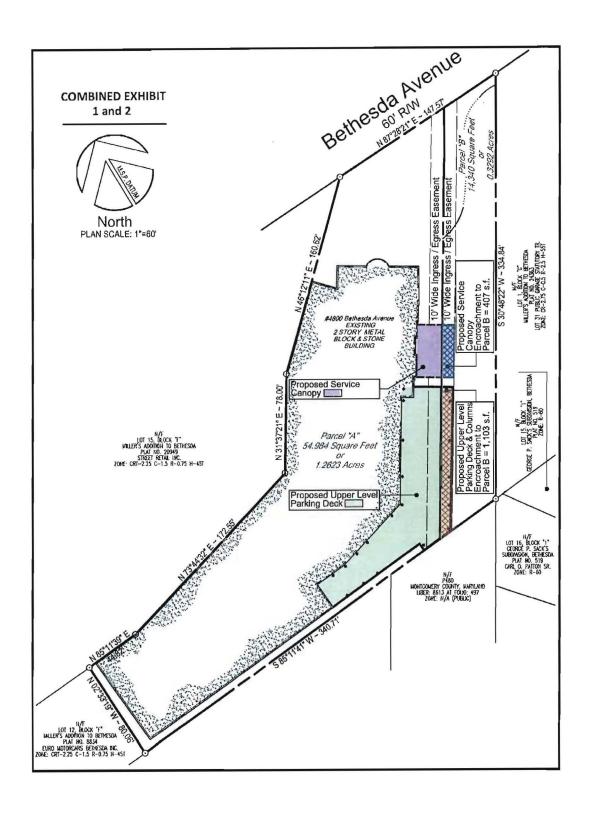
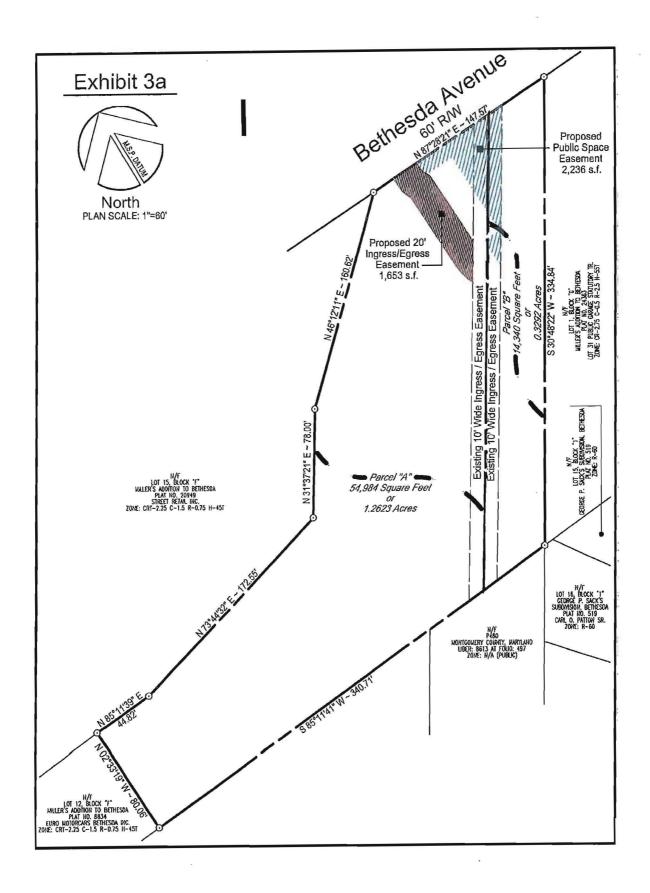
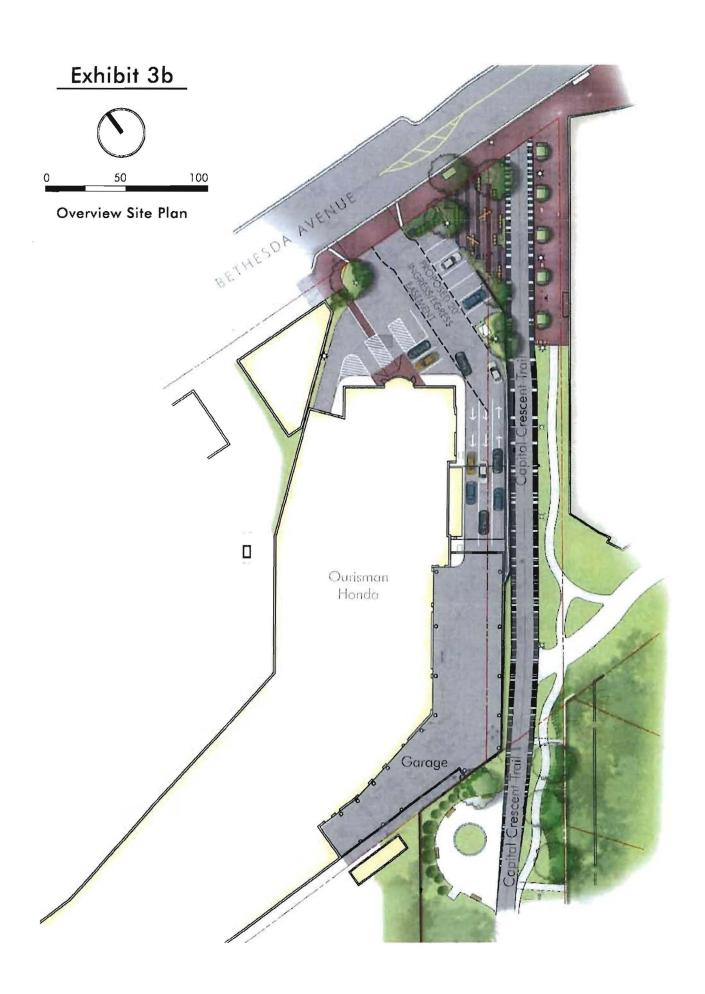
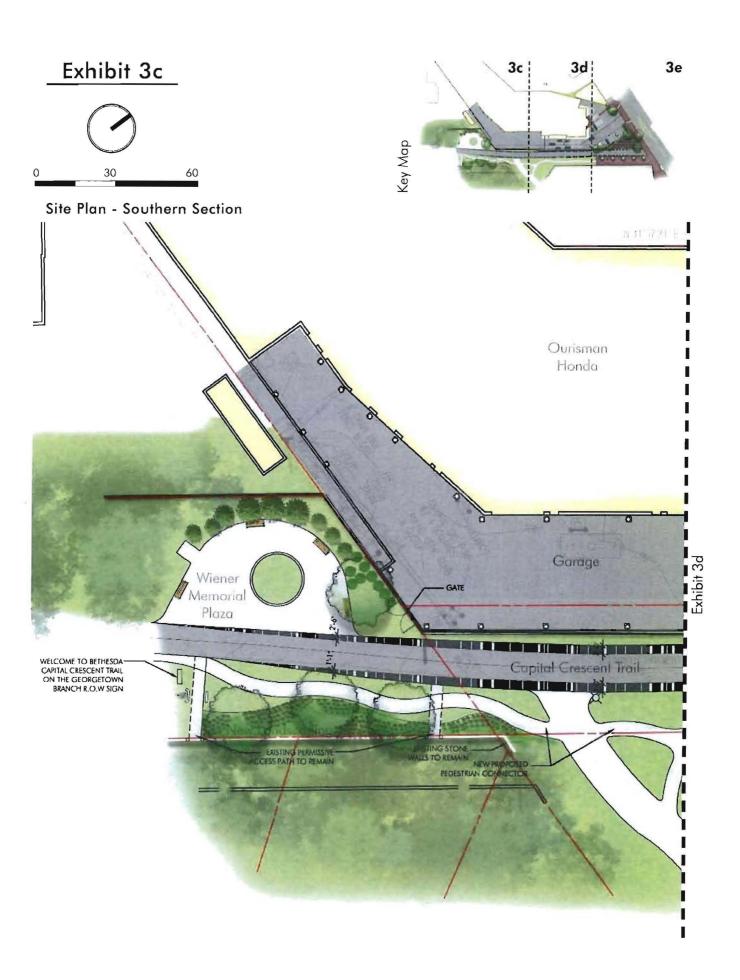
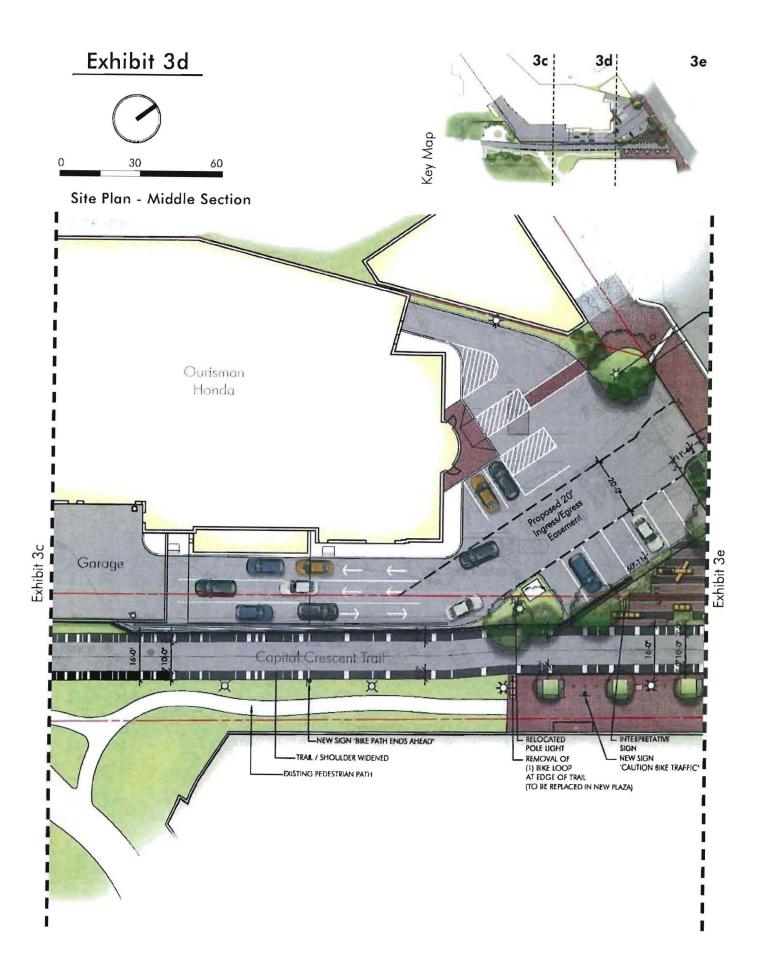


EXHIBIT 3









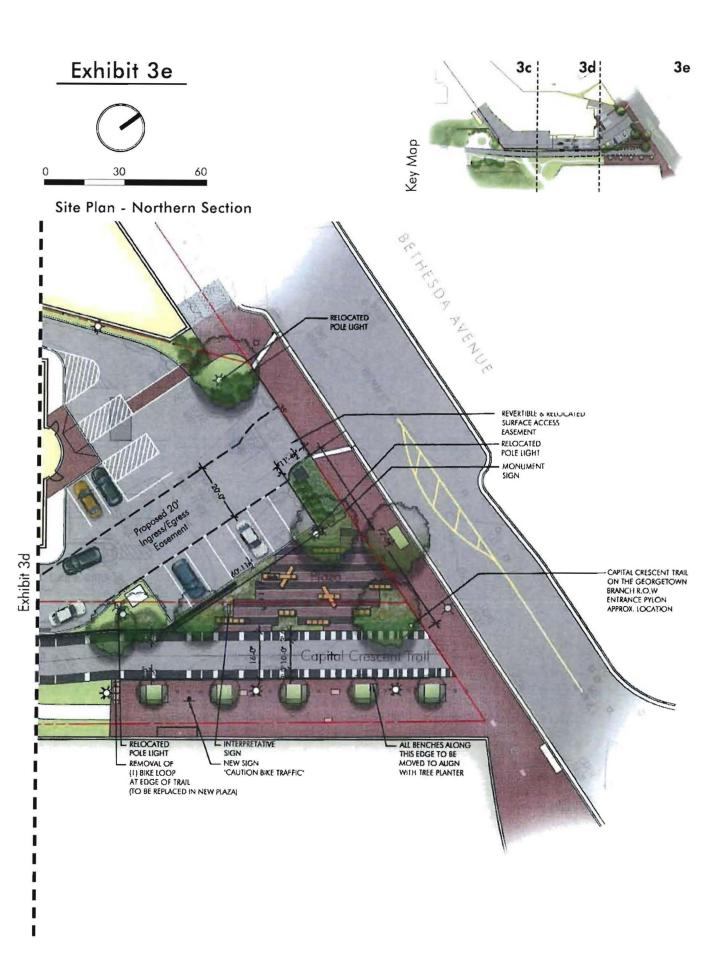




Exhibit 3g

Perspective



View to Bethesda Avenue

For illustrative purposes only pending final selection of benches and fence type.

Exhibit 3h

Perspective



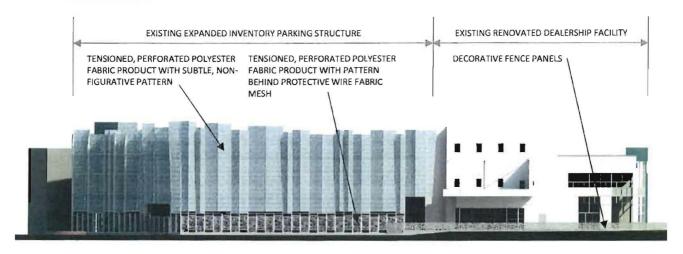
View from Bethesda Avenue

For illustrative purposes only pending final selection of benches and fence type.

EXHIBIT 4

Exhibit 4a-1

PARKING STRUCTURE
SCREEN OPTION 1



EAST BUILDING ELEVATION



VIEW FROM WOODMONT TRAIL

Exhibit 4a-2

PARKING STRUCTURE
SCREEN OPTION 1



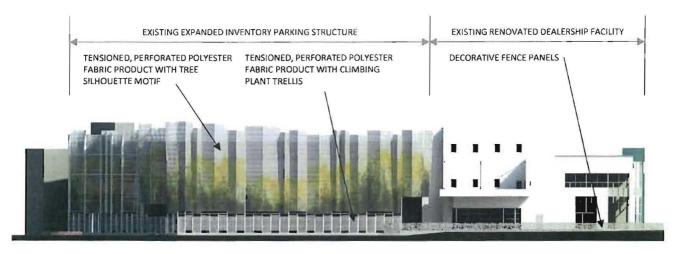
VIEW SOUTHWARD FROM CAPITAL CRESCENT TRAIL



VIEW NORTHWARD FROM CAPITAL CRESCENT TRAIL MEMORIAL PLAZA

Exhibit 4b-1

PARKING STRUCTURE SCREEN OPTION 2



EAST BUILDING ELEVATION



VIEW FROM WOODMONT TRAIL

Exhibit 4b-2

PARKING STRUCTURE
SCREEN OPTION 2



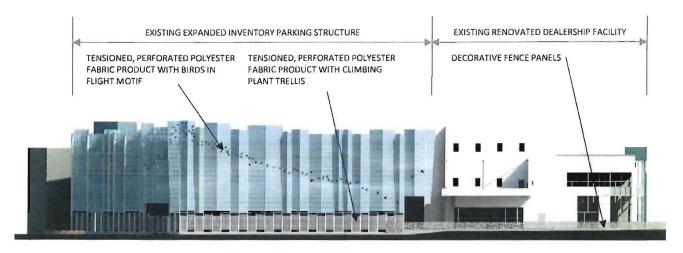
VIEW SOUTHWARD FROM CAPITAL CRESCENT TRAIL



VIEW NORTHWARD FROM CAPITAL CRESCENT TRAIL MEMORIAL PLAZA

Exhibit 4c-1

PARKING STRUCTURE SCREEN OPTION 3



EAST BUILDING ELEVATION



VIEW FROM WOODMONT TRAIL

Exhibit 4c-2

PARKING STRUCTURE SCREEN OPTION 3



VIEW SOUTHWARD FROM CAPITAL CRESCENT TRAIL



VIEW NORTHWARD FROM CAPITAL CRESCENT TRAIL MEMORIAL PLAZA

EXHIBIT 5

Maintenance Schedule

General Landscape Maintenance Guidelines for Trail Improvements:

- Tree care includes removal of dead wood, structural pruning and monitoring for pests, treating if determined necessary following IPM guidelines
- Landscape beds receive shredded hardwood mulch, and managed for weeds.
- Trails and pathways must be kept clear of weeds, debris, ice and snow.
- Integrated Pest Management (IPM) for the detection, monitoring and control of pests (weeds, insects, pathogens) must include regular inspections of the site and plant material then utilizing treatments using cultural methods and /or chemical means, only if necessary, to maintain pest populations below acceptable thresholds.

Pesticide use must comply with Montgomery Parks, Maryland Department of Agriculture, Federal (EPA label requirements), and Montgomery County regulations for use, notification and posting.

Mulch

All beds and tree wells shall be mulched with natural shredded hardwood mulch in the late winter/early spring. The mulch will be kept away from the base of the tree trunks exposing the root flair and from the crown of the shrubs. Mulch from the previous season will be cultivated and up to two inches of new mulch will be added. The goal will be to maintain no more than three inches of organic material.

Fertilization: Trees and Shrubs

Based on the results of annual soil sampling, ornamental trees up to six-inch caliper, as well as any shrubs and groundcover, will be fertilized to make up for any nutrient or pH deficiencies.

Pruning: Shrubs Perennials and Groundcover

Shrubbery that requires shearing to maintain a formal appearance will be sheared two times per year unless otherwise indicated. Informal shrubbery will be pruned twice per year unless otherwise indicated, approximately in June and in early September. Flowering shrubs shall be pruned after blooming. Hand-pruning of shrubs does not include rejuvenate pruning on overgrown plants, neglected plants or plants that have been improperly pruned or sheared in past years. Groundcovers shall be edged and pruned as needed to contain them within their borders. Standard pruning practices will be observed and all resulting debris will be removed. Perennials shall be cut back and pruned at the appropriate times. In general, perennials will be cut back in late winter unless otherwise requested.

Pruning Trees

Pruning of the deciduous trees will be limited to trees up to 8-inch caliper and pruning to a height of 14' and a branch diameter of 3". Structural pruning will be performed in the dormant season and will include removal of crossing branches, or those not consistent with standard form, general thinning for good light penetration and air circulation, elevation of lower branches to achieve consistency between the trees and to maintain safe passage of pedestrians and vehicles. Removal of dead branches will be done where it can be identified; however, this is often not detectible in the dormant season. All pruning cuts shall be made to the lateral branches, buds, or just outside the branch collar. Stubbing will not be permitted. All debris will be removed from the site. Periodically throughout the growing season, pruning of suckers, water sprouts, low-hanging branches and deadwood will be performed during our regular visits. Trees and/or shrubs of significant size or quantity identified as more than 50% dead will be documented, reported to the Owner and removed upon approval.

Integrated Pest Management (IPM)

IPM utilizes a variety of techniques to minimize plant health issues, while respecting the environment through judicial use of pesticides. The contractor shall be responsible for the detection, monitoring and control of plant damaging insects. Pesticide applications must occur under the supervision of a certified applicator and in accordance with all applicable laws and regulations and manufacture's labeled instructions. Applications of pesticide shall be based on the threshold and pest inspection report and not be done as a calendar scheduled, preventive or general cover treatment. However, application of a pre-emergent herbicide to control annual weeds in mulched areas and groundcover beds (as appropriate) is approved [note: certain sensitive groundcover or perennial plantings may not receive pre-emergent in order not to damage the material-read the label for contraindications].

There are diseases and species of insects, i.e., scale, pine bark beetle, Apple Scab, Japanese beetle, mites and borers that require an extensive control program taking several seasons to achieve control. Dormant oil shall be applied at the appropriate time to prevent phytotoxicity and give the best control of the pest. With other plant health concerns, such as Rose Rosette Disease or Ash Borer, there are no known effective control measure other than good sanitation—to remove and dispose of the affected plants or plant parts.

Weed Control

Beds and tree wells will be weeded throughout the growing season to maintain a neat appearance at all times. This will be performed through the use of pre-emergent and post-emergent herbicides, as well as hand-weeding. Chemicals will be used according to the product label. A non-selective and/or pre-emergent herbicide will be applied to cracks in all walks, curbs and other paved areas to help control the growth of weeds.

Edging

Edging of all sidewalks, curbs and other paved areas shall be performed once every other mowing during the growing season unless otherwise indicated. Debris from edging operations shall be removed and areas swept or blown clean.

Leaf Removal

Fallen leaves shall be removed three (3) times from all maintained areas in the fall (October-December). In turf areas, light accumulations of leaves will be mulched with each mowing while heavier accumulations will be removed prior to mowing from October through November.

Trash Removal

Litter collection service provided on the trail, plaza and bed areas at least once per day. Parks provides trash cans and service at the Linda Weiner Memorial.

Snow Removal

Snow removal and ice remediation services will be provided promptly for the trail, public pedestrian walkway, and the new plaza area on Bethesda Avenue when the circumstances warrant.

Other

- Remove and replace dead plants, trees and shrubs as needed.
- Repair/replace defective brick or pavers as needed.
- Repair asphalt trail surface as needed.
- Clean or repair vandalism damage as needed.

